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No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

AGUSTÍN AGUAYO,

Petitioner,

v.

**PETE GEREN, Secretary,
Department of the Army,**

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In applying the "basis in fact" test established by this Court for federal habeas corpus review of the military's denial of an application for discharge as a conscientious objector:

1. May an otherwise qualified applicant be denied because he did not come to his newly held religious beliefs through "study or contemplation," as held by the D.C. Circuit below, when any such limitation on the allowable faith-development process would create a preference for one religion over another in violation of the Religious Freedom Restoration Act and the First Amendment, and the applicable regulations do not impose such a restriction?

2. Must an otherwise qualified CO applicant come forward with evidence to corroborate his sincerity, beyond his undisputed testimony that he served a tour of duty in combat without loading his weapon, as held by the D.C. Circuit, or is he entitled to prevail unless the Army points to "objective facts [which] cast doubt on the sincerity of his claim," as held by this Court in Witmer v. United States, 348 U.S. 375, 382 (1955)?

3. May the Army support its denial with reasons articulated only after the applicant has filed his petition in court?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Aguayo and the respondent Secretary).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AGUSTÍN AGUAYO respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the denial of his application for a writ of habeas corpus to direct his honorable discharge from the United States Army as a conscientious objector.

OPINIONS BELOW

The D.C. Circuit's precedential Opinion (per Sentelle, J., with Ginsburg, Ch.J., and Randolph, J.) was filed on February 16, 2007; see Aguayo v. Harvey, 476 F.3d 971; Appx. A. The opinion of the United States District Court for the District of Columbia (per Lamberth, J.) was filed August 24, 2006, and is published as Aguayo v. Harvey, 445 F.Supp.2d 29. A copy is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2241 to a member of the United States Army seeking a discharge, was filed and entered on February 16, 2007. A copy is attached as Appendix A. Appellant's petition for rehearing by the panel or en banc was denied by Orders dated, filed and entered June 7, 2007. Copies are attached as Appendix C. By Order

dated August 29, 2007, under No. 07A174, the Chief Justice extended until Sunday, November 4, 2007, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark on the first business day following that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The federal habeas corpus statute provides, in pertinent part:

> (a) Writs of habeas corpus may be granted by ... the district courts ... within their respective jurisdictions. ...
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (1) He is in custody under or by color of the authority of the United States ....
>
> * * * *

28 U.S.C. § 2241.

The regulations of the Department of Defense governing the discharge of conscientious objectors, 32 C.F.R. part 75, are attached as Appendix D.

STATEMENT OF THE CASE

This petition arises out of a habeas corpus proceeding, in which petitioner sought review of the decision of the Secretary of the Army, denying his application for discharge as a conscientious objector ("CO"). A CO, as defined by the applicable regulations,

is a person who has firm, fixed, and sincerely held convictions which require that individual to refuse personal participation in war in any form, or at least (in some cases) to oppose the bearing of arms. Those convictions must be religious in nature, and must not have pre-existed the individual's enlistment.

a. Procedural History

The petitioner, Agustín Aguayo, a decorated combat medic, sought discharge from the United States Army pursuant to 32 C.F.R. part 75 and Army Reg. (AR) AR 600-43, as a conscientious objector. After the Army's Conscientious Objector Review Board ("DACORB") rejected petitioner's discharge application, see Parisi v. Davidson, 405 U.S. 34, 38 n.3 (1972) (Army Board's denial of CO discharge satisfies administrative exhaustion requirement), he petitioned the district court for review of that decision, a proceeding heard as a habeas corpus matter. The standard of review requires denial of the writ if the reasons given by the DACORB for its decision have any lawful "basis in fact." See Dickinson v. United States, 346 U.S. 389, 396 (1953).

In his habeas petition, petitioner advanced two principal contentions as to why the DACORB order was invalid. First, the Army violated its own regulation when it denied Mr. Aguayo's application for a meaningless and legally insufficient reason, and without making any legitimate reason for the denial part of the administrative record. Second, even if the Army denied Mr. Aguayo's CO application for the reasons eventually considered by the district court -- that is, reasons articulated by the Army only later, during and for the purpose of litigation -- those reasons have no legally sufficient basis in fact in the administrative record.

On appeal, the D.C. Circuit looked not to the reasons the Army gave when it denied petitioner Aguayo's application for discharge as a conscientious objector, but rather to the revised and expanded reasons it advanced after the litigation had begun. Appx. A, 476 F.3d at 980. The Court quoted the four reasons eventually given for denying the application:

> • Applicant lacks the religious foundation, the underpinning that supports Conscientious Objector beliefs.
>
> • Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status.
>
> • Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.
>
> • Questionable timing of the application just prior to unit deployment.

Appx. A6-7, 476 F.3d at 975. The court of appeals noted that there was no basis in fact to support the Army's conclusion that Mr. Aguayo held qualifying beliefs before he enlisted, and held that the timing of Mr. Aguayo's application for discharge could not in and of itself support the denial of his application for discharge. Appx. A, 476 F.3d at 981. The court nevertheless found bases in fact in the record to support the Army's first two reasons for denying Mr. Aguayo's application, and on that ground affirmed the district court's denial of habeas relief.

b. Statement of Facts

Agustín Aguayo was not a conscientious objector in November 2002, when at age 30 he enlisted in the Army through the Delayed Entry Program as a "Health-care Specialist." At that time, he was experiencing financial difficulties and was looking for a way to supplement his income and broaden his academic options. Although Mr. Aguayo has "always had strong feelings about war[,]" he later explained, "it wasn't till [he] joined the army that those 'feelings' changed into full fledged objections."

Shortly after he joined the military, Mr. Aguayo began to have doubts about whether he could resolve his moral qualms in a way that would allow him to remain in the Army – as he had hoped and expected he could do when he enlisted. He initially brushed aside those doubts as normal feelings of homesickness. Although he was "very nervous handling the rifle" during basic training, and "began to feel that it was wrong for him," he "didn't say anything at the time because he was hoping that the feeling would go away. He ... wanted to 'be a man' and complete what he had begun." But as his military training progressed, the feelings did not go away; they became stronger. When he trained with live ammunition in preparation for deployment to Iraq, "shooting at life-like silhouettes brought it home to him that he might really have to kill someone and that he didn't believe that he could do that."

A naturalized United States citizen born in Mexico, Mr. Aguayo began to think about what his father (who is a Jehovah's Witness and a pacifist) had taught him, and realized that he was unable to kill

anyone. He put it this way in his application for discharge as a conscientious objector:

> Shortly after being inducted into basic training and especially after being introduced to arms I realized what the Army was truly about. My morals shouted to the very core of my conscience and soul that this was wrong. Progressively it has become overwhelming. I can NO LONGER deny myself. To remain loyal to my convictions, I cannot be part of the army (sic) whether as an active participant or a (sic) unwilling bystander. I have always had strong feelings about war. I didn't like the idea of people killing each other. However, it wasn't till I joined the army that those "feelings" changed into full fledged objections. I realized that I could not hurt, injure, or kill anyone under any circumstances. I realized that I could not participate in any war and that I could not be a part of this entity based on my objections and morals.

CA App. 83a-84a. Agustín Aguayo's deeply-held moral beliefs eventually developed to the point that they prevented him from remaining in the Army, because they prohibit him from participating in war in any form, either as a combatant or as a non-combatant.

In his application for conscientious objector discharge, Mr. Aguayo explained his beliefs in the following way:

> My moral view does not allow me to take the life of another human being. Human life and preserving it is of utmost impor-

> tance to me. I could not possibly contemplate the notion of causing personal harm to others or assisting others in doing so. This also includes participating in any organized movement in a combat zone. I believe that violence of any kind, or supporting thereof, for example being a combat medic (assisting the injured to later go back to a combat area) is not acceptable. My conscience will not allow me to continue down this path. I believe that everyone has some value and I do not believe it is my place to take anyone's life. I cannot walk into any situation and assume responsibility of judge, juror and executioner. I have come to realize that it is not my place to hurt someone or end their life under any circumstance. I believe that there are higher forces which handle these situations.

J.A. 80a. Once petitioner learned about the Army's conscientious objector regulation, he prepared his application for discharge and submitted it several days later, on February 8, 2004.

When Mr. Aguayo submitted his application, he knew that it would not prevent his then-impending deployment to Iraq. While he did not file his application to avoid hazardous duty, he did hope that his filing it would allow him to "avoid having to kill people or to help other people kill -- even if it meant going unarmed to a country where people would be trying to kill me because I am an American soldier." Although Mr.

Aguayo was required to perform guard duty and to carry a weapon in Iraq, he explained, he "purposely did not load his weapon," because he "did not want to be in a position where I could harm anyone, even though this might increase the danger to myself."

After he submitted his application for discharge, the Army investigated the claim as provided in AR 600-43.[1] As required by AR 600-43 ¶ 2-1.e, and 32 C.F.R. § 75.6(c), petitioner was interviewed by a chaplain and a psychologist. The chaplain reported that Mr. Aguayo's mother was Roman Catholic and that his father was a Jehovah's Witness, but that Mr. Aguayo's own personal beliefs did not reflect an identification with any organized religion. The chaplain also reported that while Mr. Aguayo "expressed concern about his ability to be able to take a life in combat" when he was considering enlisting, he enlisted "as a medic, thinking it would lessen his conflict," and that "he would be able to work through his conflict with taking a life in combat." The chaplain concluded that Mr. "Aguayo seems to be sincere in his beliefs although the timing of his request makes it questionable."

Pursuant to AR 600-43 ¶ 2-4.a., and 32 C.F.R. § 75.6(d), the Army appointed Captain Sean D. Foster to investigate Mr. Aguayo's application. On March 14, 2004, Captain Foster conducted a hearing on Mr. Aguayo's application for discharge. At that hearing,

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[1] A new version of AR 600-43 was issued Aug. 21, 2006, and became effective on Sept. 21, 2006. See www.ard.army.mil/pdffiles/r600_43.pdf. No material changes are evident in the newer version, as compared with the 1971 version in effect during most of these proceedings.

which was conducted in Tikrit, Iraq, Captain Foster interviewed Mr. Aguayo as well as four witnesses. Each of the witnesses testified that he believed Mr. Aguayo to sincerely hold his stated beliefs. Captain Foster noted in his summary of the testimony that Mr. Aguayo became "visibly disturbed to be talking about [the prospect of having to kill someone] and seemed close to tears."

On March 20, 2004, Captain Foster submitted a written report to the Army. In that report, Captain Foster made the following findings:

> 1 – That PFC Aguayo seems to have a legitimate moral dilemma concerning his role in the military.
>
> A – After reviewing all of the evidence presented, along with all the testimonies made during PFC Aguayo's hearing, it seemed clear to me that PFC Aguayo is absolutely sincere in his stated beliefs that he is opposed to "war in any form". In the testimony given by both PFC Aguayo and his platoon sergeant, SFC Gentry, it became clear to me that PFC Aguayo's role as a "Healthcare Provider" was probably not well-defined by his recruiter and that PFC Aguayo was led to believe he would be performing duties in a health care facility such as a hospital. After finding out what his actual job would be as a medic, PFC Aguayo began to have doubts in his mind as to whether he could truly perform those duties. Despite these doubts, he continued to try to do his job the best that he could because, in

> his own words, he did not want to disappoint his family or his fellow soldiers. His objection was one that grew over time beginning in basic training and solidifying during the Convoy Livefire Exercises during gunnery October 2003. His objection is not based on religious reasons, but rather an internal moral dilemma that, to me, became very evident during the hearing. (The soldier was on the verge of tears through a great deal of the hearing.) Testimony during the hearing, interview with Chaplain Douglas Downs, information submitted in accordance with Annex B, AR 600-43, and letters from individuals that know PFC Aguayo support PFC Aguayo's stated beliefs that he has such an internal conflict that he cannot continue on with his current duties effectively.

CA App. 58a. Captain Foster concluded his report by recommending that the Army discharge Mr. Aguayo as a conscientious objector. Cpt. Foster "believe[d]" not only that this recommendation was "strongly substantiated by the submitted evidence and hearing testimonies," but also that "PFC Aguayo's stated beliefs that he is internally incapable of participating in any form of war without being in a constant state of personal moral dilemma is absolutely sincere. I believe that to deny PFC Aguayo classification as a 1-O conscientious objector would be the incorrect decision." Because Captain Foster recommended approval of his application for discharge, Mr. Aguayo submitted no rebuttal, as would have been his right under AR 600-43 ¶ 2-5.m, and 32 C.F.R. § 75.6(d)(3)(vi).

After the officer appointed by the Army to investigate his application for discharge as a conscientious objector had recommended approval of that application, Mr. Aguayo's file was forwarded through the chain of command as required by AR 600-43 ¶ 2-6 and 32 C.F.R. § 75.6(e). Although petitioner Aguayo's company commander, the officer who knew him most directly, recommended that Mr. Aguayo's application be approved, several other officers higher in Mr. Aguayo's command eventually recommended that his application for discharge as a conscientious objector be denied. None of these officers either reviewed Mr. Aguayo's complete application or interviewed him concerning his beliefs. Nor were they privy to the full report of the investigation officer. Other than Lieutenant Colonel Sinclair, none of them even met Mr. Aguayo. Every officer who actually interviewed Mr. Aguayo concerning his conscientious objector beliefs found him to be sincere.

Although Mr. Aguayo attempted to submit rebuttals to these negative recommendations, none of his rebuttals was ever forwarded to the DACORB. On July 30, 2004, the Army officially denied Mr. Aguayo's application for discharge as a conscientious objector. The Army's denial letter reads in full:

> 1. The DA [Department of the Army] Conscientious Objector review Board (DACORB) has reviewed the application of PFC Agustin Aguayo for Conscientious Objector Status (CORB).
>
> 2. After thorough examination of the Case record, the DACORB determined that the applicant did not present convincing

evidence, IAW 600-43, that the applicant's stated beliefs warrant award of 1-O status.

3. A copy of the case record will be included in the OMPF, CMIF, and MPRJ IAW AR 640-10.

BY ORDER OF THE SECRETARY OF THE ARMY

CA App. 75a. It was signed by Col. Donald W. Browne, Jr., DACORB president.

On August 5, 2005, Agustín Aguayo petitioned the United States District Court for the District of Columbia under 28 U.S.C. § 2241 for a Writ of Habeas Corpus. Following the district court's August 15, 2005, issuance of an Order to Show Cause, the parties filed a joint motion to stay the proceedings. By agreement of the parties, the Army withdrew its decision denying Mr. Aguayo's application for discharge and agreed to consider in a de novo review Mr. Aguayo's rebuttal to the adverse officer recommendations. (The failure to give such consideration, in violation of the applicable regulation, had been one of the claims in the initial habeas corpus petition.) On September 19, 2005, Mr. Aguayo submitted to the Army his rebuttal under AR 600-43 ¶ 2-5.m, and 32 C.F.R. § 75.6(d)(3)(vi).

Petitioner's rebuttal noted that the negative recommendations were by officers who had not only not read the final version of his application for discharge and the complete report of the investigation officer, but who had also never interviewed him concerning his beliefs. Following Mr. Aguayo's rebuttal, the Army never asked any of the officers who made negative recommendations either to interview Mr. Aguayo or to review the complete file to see whether it would change

their recommendations. Instead, in November 2005, the DACORB again "convened to consider [Mr. Aguayo's] request for discharge 1-O classification." One member of the DACORB -- the DACORB's lawyer-representative from the office of the Staff Judge Advocate -- voted to approve Mr. Aguayo's application for discharge. The other two members (the Chaplain member of the DACORB and the DACORB president) voted to disapprove the application. CA App. 115a.

On January 30, 2006, on the basis of this split vote, the Army once more officially denied Mr. Aguayo's application for discharge as a conscientious objector. CA App. 116a. The Army's denial letter reads in full:

> 1. The DA [Department of the Army] Conscientious Objector Review Board (DACORB) has reviewed the application of PFC Agustin Aguayo for Conscientious Objector Status.
> 2. After thorough examination of the Case Record, the DACORB determined that the applicant did not present clear and convincing evidence, IAW 600-43, that the applicant's stated beliefs warrant award of 1-O status.
> 3. A copy of the case record will be included in the OMPF, CMIF, and MPRJ IAW AR 640.10.
>
> BY ORDER OF THE SECRETARY OF THE ARMY

J.A. 116a.[2] The decision of the DACORB is the final decision of the respondent Secretary of the Army. AR 600-43 ¶2-8.a, and 32 C.F.R. § 75.6(f).

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[2] This decision differs from the Board's prior order only in two minor respects.

On March 13, 2006, petitioner Aguayo filed an amended petition for writ of habeas corpus. Eleven days later, on March 24, 2006 (nearly two months after the DACORB's final decision was rendered), the DACORB President submitted to Mr. Aguayo's commanding officer a memorandum which purported to be a more detailed recitation of DACORB's reasoning, but which he claimed was "not an exhaustive or all-inclusive list of reasons for the denial of the application." The memorandum asserts that the DACORB denied Mr. Aguayo's application, at least in part, for the following reasons:

> • Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs
>
> • Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status
>
> • Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army
>
> • Questionable timing of application just prior to unit deployment

J.A. 117a. Although filed with the district court as an exhibit to the respondent's answer to the amended habeas petition, this memorandum was never made a part of the administrative record.

After the Army's denial of his discharge application was upheld in the district court, petitioner Aguayo refused to submit to a second deployment into a war

zone. For this conduct he was convicted under the Uniform Code of Military Justice at a general court martial on March 16, 2007, of "desertion to avoid hazardous duty" and of "missing movement." In light of his direct and forthright testimony at the court martial, however, the presiding judge sentenced him to only eight months' confinement and to a "bad conduct" (not a "dishonorable") discharge. He completed service of his sentence (with credit for time already served in pretrial detention) on April 25, 2007, and is presently on "appellate leave," a status which carries ongoing responsibility to obey military authorities, but no active duties. On account of his continuing formal "custody," the case is not moot and he can benefit (through upgrade of the discharge) from a ruling in his favor. See Parisi v. Davidson, 405 U.S. 34, 46 n.15 (1972).

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii) The United States District Court had subject matter jurisdiction of this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1). See Schlanger v. Seamans, 401 U.S. 487 (1971). On appeal from the district court's ruling, the Court of Appeals' jurisdiction rested upon 28 U.S.C. §§ 1291 and 2253(a).

REASONS FOR GRANTING THE WRIT

1. The opinion of the court below disallowing a conscientious objector claim because the applicant's beliefs were not developed through "study or contemplation" conflicts with decisions of other Circuits, while violating the Religious Freedom Restoration Act and the First Amendment's Establishment Clause.

The decision of the court below raises important questions regarding the interpretation and application of the military's Conscientious Objector regulation against the backdrop of the First Amendment. On this same question -- the manner in which the quality and extent of a CO applicant's religious training are evaluated -- the decision below also conflicts with those of several other circuits. The precedent set by the decision in this case places at risk the religious freedom of all members of the military who are stationed overseas.

This case involves the well-established right of a member of the armed forces to an honorable discharge if, after the soldier enlists, his or her religious beliefs change or solidify to the point that they no longer allow participation in war in any form. Although this Court has held that conscientious objectors in the military have no constitutional right to be discharged on that basis, see Gillette v. United States, 401 U.S. 437, 462 (1971), the Department of Defense since 1962, in "recogni[tion of] the historic respect in this Nation for valid conscientious objection to military service," Parisi v.

Davidson, 405 U.S. 34, 45 (1972), has provided for the discharge of members who develop qualifying beliefs after entering military service. The Defense Department provides for the discharge of conscientious objectors because "the Congress ... has deemed it more essential to respect a man's religious beliefs than to force him to serve in the armed forces." DoD Directive No. 1300.6 (May 10, 1968), as quoted in Parisi, 405 U.S. at 45; see also 42 U.S.C. § 2000bb et seq. (Religious Freedom Restoration Act, expressing same Congressional judgment and policy).

The court below claimed a "basis in fact" to support the Army's second reason for denying Mr. Aguayo's CO discharge application on the fact that he did not develop his CO beliefs through "study or contemplation." Appx. A, 476 F.3d at 981. This holding authorizes the denial of conscientious objector status to applicants who did not develop their otherwise qualifying religious beliefs in the particular manner approved by the Army. The Establishment Clause cannot tolerate such preference to one form of religion over another, and the Religious Freedom Restoration Act plainly disallows it. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

Under the Army's regulation, "whether [the applicant's] ethical or moral convictions were gained through 'activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated'" is simply one of a half dozen "relevant factors" listed for "consider[ation]" by military decision-makers in assessing whether an applicant's stated scruples arise out of "religious training and belief," as required. 32 C.F.R. § 75.5(c)(2)(ii). This consideration

cannot be turned into a sine qua non without raising the serious constitutional problems that this Court's landmark decision in Welsh v. United States, 398 U.S. 333 (1970), set out to avoid.

The reason given by the Army to which the court below referred was the assertion that petitioner did not "provide any significant source of his beliefs." When an application for discharge as a conscientious objector is based on moral or ethical beliefs, the regulation provides that in judging the sincerity of the applicant, the Army is to look to whether the applicant gained his convictions "through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated." AR 600-43, ¶ 1-7.a(5)(a). Since petitioner's beliefs are not traditionally religious, the Army's conclusion that he did not "provide any significant source of his beliefs," must be read to mean that the DACORB thought he did not develop his beliefs through a process that was similar to the ways that traditionally religious people develop beliefs. This is the way the district court understood this reason. Appx. B, 445 F.Supp. 31, 32.

The decision of the D.C. Circuit is contrary the law in the other circuits. See Lobis v. Secretary of the Air Force, 519 F.2d 304, 307 (1st Cir. 1975) (nature and quality of religious training unimportant if applicant "has provided a plausible explanation" for development of beliefs); accord, United States v. Burton, 472 F.2d 757, 760 (8th Cir. 1973); United States v. Timmons, 464 F.2d 385, 387-88 (9th Cir. 1972); United States v. Stetter, 445 F.2d 472, 479 (5th Cir. 1971); see also Kemp v. Bradley, 457 F.2d 627, 628-29 (8th Cir. 1972); Peckat v. Lutz, 451 F.2d 366, 369 (4th Cir. 1971); Reiser v.

Stone, 791 F.Supp. 1072, 1075-76 (E.D.Pa. 1992) (Pollak, J.) (Army's finding of insincerity based on absence of "a development-of-convictions methodology that is comparable to the rigorous means by which traditional religious convictions are formulated" not supported by basis in fact where applicant provided logical explanation for development of beliefs).

The point of the regulation is not to prescribe a certain type of religious development, which would surely violate the First Amendment's Establishment Clause, but rather to put traditionally religious and non-religious objectors on an equal footing, as required by this Court in Welsh v. United States, 398 U.S. 333 (1970). No particular form of training is or can be required, and findings of lack of "depth" on these grounds have been routinely reversed. Caverly v. United States, 429 F.2d 92, 94 (8th Cir. 1970) ("The extent of religious training need not measure the depth of religious conviction."); United States v. Hesse, 417 F.2d 141, 146 (8th Cir. 1969) ("To hold sincere religious conviction, one does not have to be a theologian").

The regulation simply presupposes that non-religious objectors will develop their varied beliefs in ways that are similar to the range of paths by which traditionally religious people develop beliefs. Some will come to embrace a faith by study and contemplation, some by experience and reason, others by inspiration or through prayer, and some by sudden revelation. Many, of course, simple acquire their beliefs through childhood inculcation amounting to little more than family tradition, reinforced perhaps by Sunday school, with no "rigor [or] dedication" to speak of at all. There is nothing in the record, and nothing that is such common

knowledge as to be judicially noticeable, to support the Army Board's implicit conclusion, endorsed by the decision below, that the way Mr. Aguayo developed his beliefs is not readily comparable to the way that at least a substantial number of traditionally religious individuals develop theirs.

The closest anything in the record comes to addressing this issue is the comment of the chaplain that because Mr. Aguayo's claim does not grow from a faith tradition, it is "difficult to assess the depths of his beliefs." Appx. A, 476 F.3d at 973. The chaplain's statement fails to demonstrate that Mr. Aguayo did not develop his beliefs through a process that similar to that experienced by some traditionally religious people. While it is true that Mr. Aguayo did not develop his beliefs after rigorous training, study, and contemplation, that fact alone cannot be a reason to deny his application, especially when scholars of religion have concluded that faith development occurs in many ways -- including dramatically, and over a short period of time. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE, lect. 10, at 194 (Collier 1961). If it demonstrates anything it is either that it did not occur to the chaplain to make such a comparison, or that the chaplain lacks sufficient training and experience to make a wide-ranging analysis of this kind. Without such evidence, there is no basis in fact in the record to support the Army's second reason for denying Mr. Aguayo's application. In overlooking this important fact, the decision below wandered into serious error requiring this Court's correction on certiorari.

Since the standard imposed by the court below is not based on any necessary reading of the regulation,

and leads to a serious constitutional difficulty, it is a reading that any court is bound to eschew. See United States v. Lopez, 514 U.S. 549, 562 (1995); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 628-30 (1993) (compiling cases on avoidance of unnecessary constitutional issues); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The writ of certiorari should be granted to resolve this split in the Circuits and to rein in a divergent precedent which threatens fundamental values of religious freedom for military members.

2. The decision below is contrary to this Court's precedent enforcing the "basis in fact" test.

The decision below is also contrary to this Court's precedent. The opinion contends that "the Army is entitled to require more than mere assertion of belief, and its regulations accordingly emphasize the applicant's 'outward manifestation of the beliefs asserted' as well as the judgments of those who review each application." Appx. A, 476 F.3d at 980. Not only is that claim factually unfounded (Mr. Aguayo served an entire tour in Iraq carrying an unloaded weapon, based on his refusal to bear arms), but it was contrary to binding authority.

It has been settled for more than half a century that the nature of conscientious objection often precludes an applicant's making "out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to partici-

pation in war in any form." Witmer v. United States, 348 U.S. 375, 381 (1955). Accordingly, and contrary to the holding of the court below, a CO applicant need only assert qualifying beliefs to establish a prima facie case, and the claim must be granted unless "objective facts cast doubt on the sincerity of his claim." Id. 382.

Other circuits have had no difficult understanding and applying this precedent. See, e.g., DeWalt v. Commanding Officer, 476 F.2d 440, 442 (5th Cir. 1973) ("The Army cannot merely disbelieve an applicant for conscientious objector discharge if his case is prima facie, see Rothfuss v. Resor, 443 F.2d 554 (5th Cir. 1971), but must have a basis in fact for denial.").

DACORB is required to articulate a reason or reasons for its decision, and that reason must have a "basis in fact" in the administrative record. A "basis in fact" analysis requires two steps. The first is whether evidence actually exists in the record to support the reason for denial stated by the DACORB. Dickinson v. United States, 346 U.S. 389, 396 (1953). The second is whether that evidence is legally sufficient. For example, take a case in which the DACORB denies an application for a CO discharge for the reason that the applicant is not opposed "to war in any form." Suppose further that the only basis in the record for this reason is a statement by the applicant that he would willingly participate in a "spiritual war" to defeat the forces of the Devil in the End Times. While having a basis in the record, the DACORB's finding would not be legally sufficient to support the denial of the CO claim. See Sicurella v. United States, 348 U.S. 385, 388 (1955) (willingness to participate in "spiritual war" not inconsistent with oppo-

sition to "war in any form," within the meaning of the Selective Service statute).[3]

Notably, neither any reviewing officer, nor the DACORB itself, ever concluded that Mr. Aguayo was anything but sincere in his profession of beliefs.[4] The suggestion that his beliefs, while sincere, do not qualify him for discharge is simply mistaken.

The decision of the court below would turn Witmer on its head. Rather than requiring the Army to establish a basis in fact for disbelieving the applicant once he has made out a prima facie case, it demands that the applicant provide an objective basis for crediting the claim. Although petitioner did provide the Army with concrete evidence to credit his claim, even if he had not, under Witmer, the Army could not deny his application absent concrete evidence to doubt his sincerity. Because the decision below directly contradicts this Court's holding in Witmer, a foundational

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[3] Similarly, an applicant would not be disqualified on account of willingness to participate as a prosecutor in the "war on drugs" or to participate as a port inspector in the "war on terror." Neither "war" is what is meant by "war in any form" under the CO discharge regulation.

[4] The chaplain did not "express doubts as to the depth and source" of Mr. Aguayo's beliefs. See 476 F.3d at 980. Rather, the chaplain reported that Mr. Aguayo "seems to be sincere" (despite the timing issue), and found the depth of his beliefs "difficult to assess." Quoted in 476 F.3d at 973. But even if the chaplain had actually "expressed doubts," this would not amount to a basis in fact unless the chaplain had supported those doubts with specific reference to something petitioner had done or had said to the chaplain during their interview.

precedent explaining the "basis in fact" test, the writ should be granted.

As this Court held long ago, denial of a prima facie valid claim "solely on the basis of suspicion and speculation" is impermissible. Dickinson, 346 U.S. at 397, quoted with approval in Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1463 (1st Cir. 1991) (Breyer, J., concurring). Certiorari should also be granted on this ground.

3. The acceptance by the court below of "reasons" for denying a CO application proffered by the Army only during the litigation affords less civilian scrutiny to the military decision than is required by this Court's "basis in fact" test.

One other point in the case warrants this Court's review. By allowing the Army to revise the reasons attributed to the DACORB for denying petitioner Aguayo's application after he had filed his amended habeas corpus petition and filed his opening legal memorandum, the court below invited manipulation and abuse of this Court's prescribed limited scope of review.

None of the reasons given in the DACORB's purported supplemental memorandum corresponds to anything found in the decision notes of the individual Board members, see CA App. 115a, and they bear little if any relation to the statement of reasons that the DACORB issued in accordance with its normal procedures, either after initially reviewing Mr. Aguayo's application or after the initial voluntary remand. The potential of this irregular procedure to undermine both the applicant's due process rights and the civilian court's power of review to ensure minimally fair deci-

sionmaking by the Service Branches in their assessment of CO applications also warrants this Court's consideration and disapproval.

At this time, with the United States apparently facing another era of expanded military conflict, the Court can expect again to see more cases that raise these issues, it is did from 1969 to 1973. While there has never been a large number of conscientious objectors, all those stationed overseas whose claims are denied, but which are strong enough to warrant presentation for judicial review on habeas corpus, must file in the District of Columbia. Guidance from this Court correcting the erroneous decision of the court below is therefore particularly important in setting precedent for all military CO cases arising while on deployment.

Certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner AGUSTÍN AGUAYO prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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November 4, 2007.

APPENDIX A

Cite as: 476 F.3d 971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5241

AGUSTIN AGUAYO,

Petitioner-Appellant,

v.

FRANCIS J. HARVEY, Secretary of the Army,

Respondent-Appellee.

Argued Nov. 21, 2006.
Decided Feb. 16, 2007.

Peter Goldberger argued the cause for appellant. With him on the briefs were James H. Feldman, Jr., and James R. Klimaski.

Kevin K. Robitaille, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Jeffrey A. Taylor, U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

Before: GINSBURG, Chief Judge, and SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

*973 SENTELLE, Circuit Judge.

Agustin Aguayo, a soldier in the United States Army, applied for a discharge as a conscientious objector. The

Army denied his application, and Aguayo filed a petition for a writ of habeas corpus in the district court. The court denied the petition, and Aguayo now appeals. Because there is evidence in the record that supports the Army's decision to deny Aguayo's application for conscientious objector status, we affirm.

I

Aguayo volunteered to serve in the United States Army in November 2002, when he was 30 years old. In his enlistment agreement, Aguayo answered "no" to the following question:

> Are you now or have you ever been a conscientious objector? (That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious belief or training?)

Aguayo committed to eight years in the Army, with four years of active duty, and entered service as a healthcare specialist in January 2003.

In February 2004, shortly before he was deployed to Iraq, Aguayo applied for a discharge from the Army on the basis of conscientious objection. It is the policy of the U.S. military to grant conscientious objector ("CO") status to any service member:

> (1) Who is conscientiously opposed to participation in war in any form;
>
> (2) Whose opposition is founded on religious training and beliefs; and
>
> (3) Whose position is sincere and deeply held.

32 C.F.R. § 75.5(a). An applicant who would have qualified for CO status before entering the military, however, generally is not eligible for CO classification once in the service. Id. § 75.4(a). The Army has implemented

this military-wide policy in Army Regulation ("AR") 600-43.[1] A "Class 1-O" conscientious objector is entitled to separation from the Army, while a "Class 1-A-O" objector will continue in military service in a noncombatant status. See 32 C.F.R. § 75.3(a). Aguayo applied only for Class 1-O status.

Aguayo explained in his application that "[m]y moral view does not allow me to take the life of another human being," and that his "progressive training in arms and other military operations have progressively, and from the very beginning, caused me great anguish and guilt." Pursuant to Army regulations, Aguayo was evaluated by a psychologist and interviewed by a chaplain. The chaplain reported that "PFC [Private First Class] Aguayo seems to be sincere in his beliefs although the timing of his request makes it questionable. It is difficult to assess the depths of his beliefs because they rest solely with in his own thinking and personal values with out the support of background, family or faith group."

Captain Sean Foster was assigned to investigate the application, and in March 2004 he held a hearing in Tikrit, Iraq. Aguayo and four witnesses testified. Captain Foster wrote that after reviewing the evidence and hearing testimony, "it seemed clear to me that PFC Aguayo is absolutely sincere in his stated beliefs that he is opposed to 'war in any form,'" and that Aguayo's opposition to war grew during basic training and solidified during live fire exercises. Captain Foster concluded *974 that "PFC Aguayo's stated beliefs that he is internally

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[1] In this opinion we cite to the May 15, 1998 version of AR 600-43 in effect at the time of Aguayo's application. Some provisions were renumbered in the August 21, 2006 revision but the regulation is substantively unchanged.

incapable of participating in any form of war without being in a constant state of personal moral dilemma is absolutely sincere," and recommended that the application be granted.

The application was then forwarded through Aguayo's chain of command. Aguayo's Company Commander recommended approval, and noted that "Soldier appears to have a legitimate concern with being a soldier and this conflicts negatively with his ability to perform his duties." The next four officers to review the application, however, recommended disapproval. Aguayo's Battalion Commander interviewed Aguayo and wrote that Aguayo's "pursuit of conscientious objector status is an attempt to remedy his anxiety all soldiers face during an extended deployment in a combat theater of operations." Aguayo's Brigade Commander concurred in the Battalion Commander's assessment and wrote that he "d[id] not believe that soldier's belief is consistent w/ conscientious objection." The Staff Judge Advocate responsible for reviewing Aguayo's application also recommended disapproval. He wrote:

> PFC Aguayo's convictions do not appear to be sincerely held.... He has not persuasively shown how his duties as a medic are incompatible with his newly discovered beliefs, other than stating he feels he was misled by his recruiter, and he expected to work in a hospital. The timing of his application raises doubts as well .... PFC Aguayo did not identify any specific ways he has altered his behavior to accommodate his beliefs. Although practicing a religion is not a requirement for CO approval, PFC Aguayo has not discussed any equally significant source of his beliefs other than he was raised in a kind and

> respectful family .... As stated by his battalion commander, ... he desires to get out of the deployment and the Army, and he is using this process in an attempt to end his service early.

Finally, Aguayo's Division Commander recommended disapproval. Aguayo's application then went to the Department of the Army Conscientious Objector Review Board ("DACORB" or "Board") at the Department of the Army headquarters ("HQDA"); the DACORB makes the final decision on all CO applications requesting discharge. The Board denied Aguayo's application in July 2004.

In August 2005 Aguayo petitioned the United States District Court for the District of Columbia, pursuant to 28 U.S.C. § 2241, for a writ of habeas corpus ordering the Army to discharge him as a conscientious objector. The parties agreed to stay the proceedings in light of Aguayo's assertion that the Army had violated its own regulations by failing to provide him with the opportunity to rebut the negative recommendations from the officers in his chain of command. Aguayo then submitted an amended application, and the Army agreed to have the DACORB review the entire application de novo.

The amended application included a rebuttal to the officers' recommendations and more detailed responses to several questions from Aguayo's initial application. For example, Aguayo explained that his beliefs had changed during his Army training:

> As the trainings progressed I knew I could not stab anyone with a bayonet for instance. And when I felt the earth tremble beneath me after firing an M-16 I felt and I now know there's no way I could point it at someone and shoot.... My convictions are strong and are deeply rooted based on my upbringing, morals, and the experiences I have had in the army.

As to the nature of his beliefs, Aguayo explained that he was agnostic and that he *975 had "a deep admiration for people such as Jesus Christ, Gandhi, and Martin Luther King. I treasure their values and desire to follow their lead .... I believe that if there is a creator he would not want his creations to hurt or damage each other." To the question of what aspects of his life "most conspicuously demonstrate[ ] the consistency and depth" of his beliefs, Aguayo wrote that "I avoid violent movies and violent entertainment. I try to avoid the more warlike aspects of training. I will always try to act in accordance with my beliefs."

In January 2006 the DACORB again denied Aguayo's application. The denial stated that "[a]fter thorough examination of the Case Record, the DACORB determined that the applicant did not present clear and convincing evidence, IAW [in accordance with] AR 600-43, that the applicant's stated beliefs warrant award of 1-O status."

On March 14, 2006, Aguayo filed an amended habeas corpus petition in the district court. In April, the Army opposed the amended petition and filed the administrative record as well as a memorandum from the DACORB dated March 24, 2006 (the "supplemental memorandum"). This memorandum lists several reasons why the DACORB denied Aguayo's application:

> Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs.
>
> Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status.
>
> Appears that applicant held beliefs prior to entry to the Army. Although these could have

crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.

Questionable timing of the application just prior to unit deployment.

The supplemental memorandum also states that "[t]his is not an exhaustive or all-inclusive list of reasons for the denial of this application."

In August 2006 Aguayo sought an injunction to prevent his deployment to a war zone pending the resolution of his habeas claim. By order and opinion of August 24, 2006, the district court denied Aguayo's habeas petition and denied the injunction as moot. Aguayo v. Harvey, 445 F.Supp.2d 29 (D.D.C. 2006). Aguayo immediately appealed and sought an injunction from this court. We denied the injunction pending the appeal but agreed to expedite the case. Aguayo argues that we should reverse because the district court should not have considered the DACORB's supplemental memorandum and because there is no basis in fact for the denial of his CO application. We disagree with these arguments and affirm.[2]

II

For purposes of the federal habeas corpus statutes, members of the Armed Forces are in the custody of the

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[2] We have been advised that, after this court denied the injunction, Aguayo failed to report for his unit's movement to Iraq and departed without the authority of his unit. At the time of oral argument, Aguayo was in Army custody and faced court-martial charges. As discussed below, we base our decision on the record before the district court. Because we affirm the judgment of the district court, Aguayo's current status does not affect our disposition of this case. See Parisi v. Davidson 405 U.S. 34, 46 n. 15, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972).

United States government. Parisi, 405 U.S. at 39, 92 S.Ct. 815. After exhausting all procedures for administrative relief, *976 service members may challenge their custody by petitioning for a writ of habeas corpus in federal court under 28 U.S.C. § 2241. Parisi, 405 U.S. at 39, 92 S.Ct. 815; Alhassan v. Hagee, 424 F.3d 518, 521-22 (7th Cir. 2005).

A

Aguayo's first argument concerns the DACORB's March 2006 supplemental memorandum, which lists several reasons for the Board's denial of Aguayo's application. Aguayo contends that the district court should not have consulted this memorandum-and accordingly that the memorandum should be disregarded on appellate review-because it was created after Aguayo filed his amended habeas petition and because the memorandum does not comply with military regulations. We hold that the supplemental memorandum may properly be reviewed in assessing the merits of Aguayo's habeas petition.

Aguayo is correct that judicial review of an administrative decision is generally limited to the existing administrative record. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion 470 U.S. 729, 743, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985) (quoting Camp v. Pitts 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)). But this principle of administrative law does not preclude consideration of the supplemental memorandum in this habeas corpus proceeding. Under the Administrative Procedure Act ("APA"), agencies generally must state the grounds for their decision to deny a written application. See 5 U.S.C. § 555(e); Tourus Records, Inc. v. Drug Enforcement Admin., 259 F.3d 731, 737 (D.C.Cir. 2001);

Roelofs v. Sec'y of the Air Force, 628 F.2d 594, 599 (D.C.Cir. 1980). This requirement facilitates judicial review, because one of the tasks of the reviewing court is to determine whether an agency decision finds adequate support in the administrative record. Accordingly, when the statement of reasons is inadequate, in an APA case "the usual remedy is a 'remand to the agency for additional investigation or explanation.'" Tourus Records, 259 F.3d at 737 (quoting Florida Power & Light, 470 U.S. at 744, 105 S.Ct. 1598). In this case, the supplemental memorandum provides additional explanation, and we are not inclined to disregard it simply because it was not produced in response to a remand.

Moreover, in refusing to ignore the supplemental memorandum we note that we are not reviewing a claim brought under the APA but rather a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Habeas proceedings are governed by their own rules, and Habeas Corpus Rule 7 expressly provides that "the judge may direct the parties to expand the record by submitting additional materials relating to the petition." Rules Governing § 2254 Proceedings, Rule 7(a), 28 U.S.C. foll. § 2254. See also id. Rule 7(b) ("The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record."); id. Rule 1(b) ("district court may apply any or all of these rules to a habeas corpus petition not covered" by scope of Rules Governing § 2254 Proceedings). In this case, the judge did not direct the Army to expand the record but instead accepted the memorandum as an attachment to the Army's opposition papers; this is a distinction without a difference and we will not exclude

the memorandum on this basis. Aguayo also argues that, Habeas Rule 7 notwithstanding, courts may not consider new evidence in reviewing a conscientious objector habeas petition. See, *977 e.g., Armstrong v. Laird, 456 F.2d 521, 522 (1st Cir. 1972). But this argument has no bearing on this case. We agree that the Army's decision to reject Aguayo's CO application must be supported by evidence in the administrative record as that record existed when it was reviewed by the DACORB, but the supplemental memorandum does not purport to contain such evidence. Rather, it lists reasons for the Board's decision, and under the standard of review we apply to a denial of a service member's CO application, it is the Board's decision that must have a factual basis. (The standard of review we apply to the Army's denial of Aguayo's CO application is discussed below in section II.B.) The supplemental memorandum might tell us where to look for evidence that Aguayo is or is not entitled to be classified as a conscientious objector, but we emphasize that in reviewing the Board's decision we look to the same evidence reviewed by the Board.

Aguayo also contends that the supplemental memorandum cannot be considered because it did not comply with the military's conscientious objector regulations. "The reasons for an adverse decision will be made a part of the record and will be provided to the individual." 32 C.F.R. § 75.6(f). The corresponding Army regulation provides that "[i]f a determination by HQDA that the person's request is disapproved [sic], the reasons for this decision will be made a part of the record. It will be provided to the person through command channels." AR 600-43 ¶ 2-8.d.(3). Aguayo argues that the supplemental memorandum was not "made a part of the record," because it was created after Aguayo filed his amended

petition; Aguayo also states that he did not receive the memorandum "through command channels." The Army responds that the memorandum was indeed provided to Aguayo's commanding officer, and in any event Aguayo learned about the supplemental memorandum when the Army filed it with the district court. We agree with the Army that any errors in the Army's handling of the memorandum do not merit excluding it from consideration.

Because we will not exclude the supplemental memorandum from consideration, we do not reach Aguayo's argument that the remainder of the record does not present a valid reason for denying his application. As Aguayo rightly points out, the DACORB's January 2006 decision does not give us much to work with. It states simply that "[a]fter thorough examination of the Case Record, the DACORB determined that the applicant did not present clear and convincing evidence, IAW [in accordance with] AR 600-43, that the applicant's stated beliefs warrant award of 1-O status." But because we hold that the supplemental memorandum is properly before this court, we need not decide whether this boilerplate denial would be sufficient to guide judicial review of the DACORB's decision in light of the regulations' clear requirement that the Board provide its reasons for denying an application. Cf. Gruca v. Sec'y of the Army 436 F.2d 239, 245 (D.C. Cir. 1970) (holding, in a case involving a challenge to a Selective Service classification, "[i]t is enough if there is evidence in the record from which we can garner the basis of the Board's action"). Nor do we decide what the appropriate remedy would be if it were not sufficient. See, e.g., United States ex rel. Coates v. Laird, 494 F.2d 709, 712 (4th Cir. 1974) (holding that, where the Marine Corps failed to give a reason for its

denial of a CO application, the proper procedure "is to remand the proceedings to the service for reprocessing and for compliance with the requirement of a statement of reasons").

B

The Army's decision to deny an application for conscientious objector status*978 will not be disturbed unless there is no factual basis for the decision. United States v. Seeger, 380 U.S. 163, 185, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); United States ex rel. Barr v. Resor, 443 F.2d 707, 708 n. 2 (D.C.Cir. 1971). The scope of our review under the "basis in fact" standard is extremely narrow. We neither substitute our judgment for that of the military nor look for substantial evidence to support its decision. Witmer v. United States, 348 U.S. 375, 380-81, 75 S.Ct. 392, 99 L.Ed. 428 (1955). Under this standard the Army's decision "can be overturned only if it has 'no basis in fact.'" Id. at 381, 75 S.Ct. 392; see also Dickinson v. United States, 346 U.S. 389, 396, 74 S.Ct. 152, 98 L.Ed. 132 (1953).

"Basis in fact" review in conscientious objector cases traces to the Supreme Court's 1946 decision in Estep v. United States, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567. Under the conscription laws then in effect, decisions of civilian draft boards regarding the classification of selective service registrants were "final" and the law did not provide for judicial review. Estep was prosecuted for failing to submit to induction, and the Court held that he could challenge his military service classification in that prosecution.

> The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which

> obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

Estep, 327 U.S. at 122-23, 66 S.Ct. 423; see also Dickinson, 346 U.S. at 394, 74 S.Ct. 152; Witmer 348 U.S. at 380-81, 75 S.Ct. 392. In 1967 Congress amended the draft laws to reflect the limited judicial review recognized in Estep, and the Selective Service Act now authorizes review of draft classifications in certain criminal prosecutions "only when there is no basis in fact for the classification assigned to such registrant." 50 U.S.C.App. § 460(b)(3); see United States ex rel. Sheldon v. O'Malley, 420 F.2d 1344, 1348 (D.C.Cir. 1969).

This same standard governs judicial review of a petition for a writ of habeas corpus following the military's denial of a service member's application for discharge as a conscientious objector. In contrast to selective service registrants who request CO classification under the draft laws, however, those who have volunteered to serve in the military do not have a statutory right to apply for CO status. Rather, the Department of Defense has, by regulation, authorized members of the Armed Forces to apply for such status. Dep't of Defense Directive 1300.6. (Aug. 20, 1971 rev.), as codified in 32 C.F.R. pt. 75 (2004 ed.); see Parisi 405 U.S. at 45, 92 S.Ct. 815. This regulation "reflects a policy determination to extend to persons already within the armed services the rights of conscien-

tious objection conferred by Congress upon those subject to the Selective Service Act." Sheldon, 420 F.2d at 1348. Accordingly, "judicial precedents involving claims to exemption from entry into military service because of conscientious objection are applicable to requests for discharge on the same ground by those who voluntarily entered the service." Id. Although the standard of review we apply in this case is dictated by precedent, we note that the limited scope of review in military habeas cases is consistent with the general principle that courts will afford military *979 personnel decisions considerable deference. See Piersall v. Winter, 435 F.3d 319, 321-22 (D.C.Cir. 2006).

C

On review of the administrative record, we agree with the Army that there is a factual basis for the decision to deny Aguayo's CO application. Our review is guided by the Army's CO regulations and by the explanation for the Army's decision in the supplemental memorandum. By regulation, it is the applicant's burden to establish, by clear and convincing evidence, that he or she meets the requirements for conscientious objector status. AR 600-43 ¶ 1-7.c. The Army defines conscientious objection as "[a] firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief." Id. Glossary. "Religious training and belief" is broadly defined to include "deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being." Id. The Supreme Court has stated that "the ultimate question in conscientious objector cases is the sincerity of the registrant." Witmer, 348 U.S. at 381, 75 S.Ct. 392. This concern for the applicant's sincerity is reflected in the Army's regulations:

> Sincerity is determined by an impartial evaluation of each person's thinking and living in totality, past and present. The conduct of persons, in particular their outward manifestation of the beliefs asserted, will be carefully examined and given substantial weight in evaluating their application.

AR 600-43 ¶ 1-7.a.(5)(a).[3] The regulations further provide a list of factors to be considered in such an "impartial evaluation." These factors

> include training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious

---

[3] The Department of Defense regulation includes a similar instruction:

> A primary factor to be considered is the sincerity with which the belief is held. Great care must be exercised in seeking to determine whether asserted beliefs are honestly and genuinely held. Sincerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present. Care must be exercised in determining the integrity of belief and the consistency of application. Information presented by the claimant should be sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate that expediency or avoidance of military service is not the basis of his claim.

32 C.F.R. § 75.5(c)(2).

convictions are formulated; credibility of persons supporting the claim.

Id. ¶ 1-7.a(5)(b). In addition to the applicant's own testimony and written application, the regulations call for a number of assessments and recommendations by Army personnel. A military chaplain interviews each applicant and provides comments on the applicant's demeanor, depth of conviction, and source of beliefs. Id. ¶ 2-3.a. An investigating officer, chosen from outside the applicant's chain of command, conducts a hearing and submits a report. Id. ¶¶ 2-4, 2-5. Officers in the applicant's chain of command and a Staff Judge Advocate review the record and offer their recommendations. Id. ¶ 2-6. The review process thus relies heavily on the considered opinions of a number of officers in addition to those who serve on the DACORB.

*980 In this case, the DACORB ruled that Aguayo "did not present clear and convincing evidence ... that the applicant's stated beliefs warrant award of 1-O status." The March 2006 supplemental memorandum explained the Board's view that Aguayo lacked the "religious foundation" or "underpinning" required of conscientious objectors and had not adequately explained the source of his claimed beliefs; that Aguayo appeared to hold his beliefs prior to enlistment; and that the timing of Aguayo's application was suspect.

In short, the DACORB questioned the nature and source of Aguayo's beliefs. Accordingly, we review the record for evidence that would support the Board's misgivings, and we conclude that the Board's decision has factual support in the record. To be sure, Aguayo explained that "[m]y moral view does not allow me to take the life of another human being" as well as his belief that "higher forces will be in charge of any retribution against any evils." But the

Army is entitled to require more than mere assertions of belief, and its regulations accordingly emphasize the applicant's "outward manifestation of the beliefs asserted" as well as the judgments of those who review each application. AR 600-43 ¶ 1-7.a.(5)(a). The nature of the applicant's case determines the type of evidence needed to rebut the claim. Witmer, 348 U.S. at 382, 75 S.Ct. 392. For example, Dickinson, involved a Selective Service registrant who produced "uncontroverted evidence" that he met the objective statutory criteria for a ministerial exemption from military service. 346 U.S. at 396-97, 74 S.Ct. 152. The Supreme Court held that the local draft board's denial of the exemption must be supported by "some proof that is incompatible with the registrant's proof of exemption." Id. at 396, 74 S.Ct. 152. In Witmer, a conscientious objector case, the Supreme Court distinguished Dickinson and stated that "[i]f ... the issue is the registrant's sincerity and good faith belief, then there must be some inference of insincerity or bad faith." 348 U.S. at 382, 75 S.Ct. 392. In the instant case, the issue is Aguayo's demonstration of his beliefs as required by the Army's regulations and as assessed by the officers who reviewed his application. "Aside from an outright admission of deception -- to expect which is pure naivety -- there could be no more competent evidence against [a registrant's] claimed classification than the inference drawn from his own testimony and conduct." Gruca, 436 F.2d at 246 (quoting Witmer, 348 U.S. at 383, 75 S.Ct. 392). Here, the record supports the inference that Aguayo's convictions do not require his classification as a conscientious objector.

The Battalion Commander, Brigade Commander, Division Commander, and Staff Judge Advocate each recommended that Aguayo's application be denied. The

Battalion Commander, who interviewed Aguayo, concluded that "[i]n [Aguayo's] mind, the psychological impact of being deployed in a combat theater and separated from his family, outweigh the benefits associated with military service." The Staff Judge Advocate concluded that "Aguayo did not identify any specific ways he has altered his behavior to accommodate his beliefs." The chaplain -- whose duty is to offer comments but not a formal recommendation, see AR 600-43 ¶ 2-3.a.(2) -- expressed doubts as to the depth and source of Aguayo's convictions. To find for Aguayo in this case would be to disregard this evidence. We would be reluctant to do so under all but the most extraordinary circumstances, and the record in this case provides no ground to second guess the opinions and conclusions of the Army officers who opposed Aguayo's application.

We review the entire record to determine whether there is a basis in fact for *981 the Army's decision. No single fact or statement is dispositive. Our conclusion is based on the entire record and in particular Aguayo's own application and rebuttal statements. For example, Aguayo's own application materials provide reason to doubt whether his beliefs developed through "activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated" or "are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them." AR 600-43 ¶ 1-7.a.(5)(b); id. Glossary. Aguayo explained that he was raised by religious parents and that his father is a pacifist. Certainly this upbringing may be a source of his beliefs, but Aguayo also maintains that he was not a conscientious objector when he volunteered for the Army. The Army will consider claims "growing out of" pre-enlistment experi-

ences, so long as the applicant's beliefs become fixed after entering the service. Id. ¶ 1-7.a.(1). Though Aguayo stated that his Army training caused him anguish and guilt, we find little indication that his beliefs were accompanied by study or contemplation, whether before or after he joined the Army. More to the point, we certainly cannot say that the reviewing officers' doubts as to Aguayo's convictions are so inconsistent with the record that their recommendations must be disregarded. In this appeal, Aguayo insists that the "crystallization" of conscientious objector beliefs, like the process of religious conversion, is not always the result of prolonged study and can instead be dramatic and quick, as when it is precipitated by a life crisis -- in Aguayo's case, his experience in weapons training. Clearly, this was not an open-and-shut case: both Aguayo's Company Commander and the investigating officer recommended the application be approved. But the decision in close cases rests with the DACORB, not the courts, and the officers' recommendations are consistent with both the Army's regulations and the record.

In addition, Aguayo applied for discharge as a conscientious objector shortly after arriving at his unit and just days before his deployment to Iraq, a fact noted by the chaplain and which "raise[d] doubts" in the mind of the Staff Judge Advocate. This court has held that the suspect timing of a CO application is not, in itself, sufficient grounds for its denial. Bortree v. Resor, 445 F.2d 776, 784 (D.C.Cir. 1971). The current regulations list timing as a factor that may be considered but expressly provide that timing alone "is never enough to furnish a basis in fact to support a disapproval." AR 600-43 ¶ 1-7.a.(5)(c). The DACORB in this case could properly find that the circumstances surrounding Aguayo's application constituted a factor that weighed against its approval.

III

For the foregoing reasons, the order of the district court denying Agustin Aguayo's petition for a writ of habeas corpus is affirmed.

So ordered.

APPENDIX B

445 F.Supp.2d 29

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Agustín AGUAYO, Petitioner,

v.

Francis J. HARVEY, Secretary of the Army, Respondent.

Civil Action No. 05-1580(RCL).
Aug. 24, 2006.

James R. Klimaski, Klimaski & Associates, PC, Washington, DC, James H. Feldman, Jr., Law Office of Peter Goldberger, Ardmore, PA, for Petitioner.

Kevin K. Robitaille, U.S. Attorney's Office, Washington, DC, for Respondent.

MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter comes before the Court on Agustin Aguayo's ("Aguayo") Petition for a Writ of Habeas Corpus [10]. Aguayo challenges the denial of his application for discharge from service as a conscientious objector. Upon consideration of the filings, the applicable law, and the entire record herein, the Court concludes that the petition will be denied.

BACKGROUND

The Department of Defense has established procedures for processing applications for discharge on the basis of conscientious objection. See 32 C.F.R. part 75

("Conscientious Objectors"). To implement these regulations, the Army issued Army Regulation ("AR") 600-43, which defines conscientious objection as a "firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief." AR 600-43, Glossary § II ("Terms"). The regulation defines religious training and belief as "belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being.... The term 'religious training and belief' may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as 'religious' in traditional sense ..." Id. A applicant for discharge based on conscientious objection (known as "1-O status") must demonstrate that he or she meets this definition by clear and convincing evidence. AR 600-43, ¶ 1-7(c).

Specialist Agustin Aguayo ("Petitioner"), a soldier in the United States Army ("Army"), requested a discharge from service, alleging conscientious objector ("CO") status. Petitioner voluntarily enlisted in the Army on November 19, 2002, for eight years with four years of active duty. R. at 2, 13. He entered service on January 14, 2003. In February 2004, shortly after arriving at his unit and receiving notice of a deployment to Iraq, Aguayo submitted an application for discharge on the basis of conscientious objection. R. at 47, 62-63. Chaplain Downs and a psychologist interviewed petitioner in February of 2004. Following the interviews, Colonel Randal A. Dragon appointed Captain Sean Foster as the Investigating Officer ("IO"). After the investigation, the IO recommended that petitioner be granted conscientious objector status. R. at 110. On March 3, 2004, petitioner waived

his rebuttal rights and the IO signed his Findings and Recommendations Memorandum on March 20, 2004. R. 53-54.

Following, the IO's recommendation of approval, Aguayo's Battalion and Brigade Commanders recommended disapproval. R. at 55-58. After receiving legal review from the Staff Judge Advocate, the Commanding*31 General, Major General John R.S. Batiste, also recommended disapproval of petitioner's application on May 23, 2004. R. at 46. Attached to Major General Batiste's recommendation was a memorandum from the Staff Judge Advocate, which recommended disapproval for the following reasons:

> a. PFC Aguayo's convictions do not appear to be sincerely held. CPT Foster conducted an extensive interview with PFC Aguayo and a thorough investigation into his background. PFC Aguayo is a medic. He has not persuasively shown how his duties as a medic are incompatible with his newly discovered beliefs, other than stating he feels he was misled by his recruiter, and he expected to work in a hospital. The timing of his application raises doubts as well. Only days prior to his unit's deployment to Iraq, PFC Aguayo submitted his application. Chaplain Downs agreed that "the timing of his request makes it questionable." In addition, PFC Aguayo is applying for CO Status (1-O) together with his friend, also a medic, PFC Benson.
>
> b. PFC Aguayo did not identify any specific ways he has altered his behavior to accommodate his beliefs. Although practicing a religion is not a requirement for CO approval,

> PFC Aguayo has not discussed any equally significant source of his beliefs other than he was raised in a kind and respectful family. The evidence shows PFC Aguayo performing well as a medic. As stated by the battalion commander, LTC Sinclair, he desires to get out of the deployment and the Army, and he is using this process in an attempt to end his service early.

Pet. at 7-8.

On June 24, 2004 and again on July 14, 2004, Aguayo submitted a rebuttal to Major General Batiste's recommendation, arguing that the recommendation did not contain sufficient reasons for decision. Id. On July 14, 2004, the Army rejected Aguayo's rebuttal as procedurally defaulted because his application for discharge had already been submitted. Id. On July 30, 2004, the Department of the Army Conscientious Objector Review Board ("DACORB") determined that SPC Aguayo did not qualify as a conscientious objector and therefore was not entitled to be separated from service. R. at 131.

Aguayo filed his petition in this Court on August 5, 2005. On August 15, 2005, the Court issued an Order to show cause why the writ should not issue. The Army withdrew its denial of Aguayo's application and agreed to consider Aguayo's rebuttal. This Court stayed this case until further order. On January 30, 2006, the Army again denied Aguayo's application. R. at 89. Petitioner amended the petition on March 13, 2006. On April 10, 2006 the Court lifted the stay and established a briefing schedule.

LEGAL STANDARD

Petitioner is challenging an internal military personnel decision. Military personnel decisions are

afforded substantial deference. Piersall v. Winter, 435 F.3d 319 (D.C.Cir. 2006). The Court does not weigh the evidence or test whether substantial evidence supports the military's position. Witmer v. United States, 348 U.S. 375, 380-81, 75 S.Ct. 392, 99 L.Ed. 428 (1955). Instead, the court must "search the [administrative] record for some affirmative evidence to support the local board's overt or implicit finding." Dickinson v. United States, 346 U.S. 389, 396, 74 S.Ct. 152, 98 L.Ed. 132 (1953). In other words, the Army must demonstrate that its decision had some basis in fact. *32 United States ex rel. Barr v. Resor, 443 F.2d 707, 708 (D.C.Cir. 1971).

DISCUSSION

Petitioner argues that he has satisfied each of the requirements set out in Department of Defense regulations, 32 C.F.R. Part 75, and that the record does not contain the Army's reasons for denying petitioner's application. Traverse at 14. Respondent maintains that the record provides ample evidence to meet the "basis in fact" standard, and that the denial memorandum issued by the Army on January 30, 2006, satisfies the regulatory requirement to provide "reasons" for the denial of Aguayo's conscientious objector application.

A. Conscientious Objector Application

The Army's established procedure for the evaluation of CO claims provides that military personnel will exercise their discretion in determining whether the soldier has met his burden of establishing CO status by clear and convincing evidence. Under 32 C.F.R § 75.5, the military must discharge any member:

> (1) Who is conscientiously opposed to participation in war in any form;
>
> (2) Whose opposition is founded on religious training and belief; and

(3) Whose position is sincere and deeply held.

32 CFR § 75.5(a); see also Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). In addition, "no member of the Armed Forces who possessed conscientious objector beliefs before entering military service is eligible for classification as a conscientious objector" if such pre-existing beliefs would have qualified him for a CO exemption under the draft laws. 32 C.F.R. § 75.4(a)(1). To implement this regulation, the Army has adopted AR 600-43.

Petitioner claims that he has made out a prima facie case for discharge as a conscientious objector. Pet. at 12. The Court does not agree and finds that the DACORB properly concluded that Aguayo did not demonstrate grounds for discharge by clear and convincing evidence.

Army Regulation 600-43 ¶ 1-7(b) states:

> Relevant factors that should be considered in determining a person's claim of conscientious objection include training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; credibility of persons supporting the claim.

Petitioner's application does not identify any religious training or belief that would justify conscientious objector status. See R. at 95-106. Aguayo's beliefs do not appear to be grounded in religious principles or developed through activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated. R. at 73. In addition, the timing of Aguayo's application is suspect. He enlisted in the Army after a

religious upbringing, and with full knowledge not only that the Army's mission is to defend this nation, but also that hostilities flowing from the September 11, 2001 attacks had already begun. R. at 97. Shortly after arriving at his unit, and after the unit was informed of a pending deployment, petitioner applied for CO status. See R. at 47, 73. During the same time period, one of Aguayo's friends also applied for conscientious objector status. R. at 47. While suspicious timing alone is not enough to *33 deny an application, AR 600-43, 1-7.a.(5)(c), it supports denial.

The beliefs Aguayo asserts all arose prior to his enlistment. R. at 95-100. The obligation of the conscientious objector is to give timely notice of his reservations. AR 600-43 ¶ 1-7(a)(1). Aguayo states that he enlisted in the Army because of financial burdens associated with educational expenses. R. at 96-97. A true conscientious objector who hides his beliefs to obtain the benefits of military service is not allowed to then claim CO status when called to serve. See Nurnberg v. Froehlke, 489 F.2d 843, 847 (2d Cir.1973). ("There is no national policy that we know of which permits the true conscientious objector to hide his beliefs in order to obtain the advantages of a commission, and then when called to serve, suddenly to advert to his conscience."). The Court concludes that the Army's decision had a sufficient basis in fact

B. DACORB's Reason for Denial

Army Regulation 600-43 ¶ 2-8(d)(1) requires the DACORB, upon disapproving a discharge application, to "furnish the [applicant] a copy of the disapproval recommendations and the supporting reasons." If the disapproval is made final by the Army, "the reasons for this decision will be made a part of the record." Id. ¶ 2-8(d)(3). Petitioner argues that the Army violated these

regulations "when it failed to include in the record its reason or reasons for denying Mr. Aguayo's application." Traverse at 14. The Army contends that, properly interpreted, the regulation requires no more than what the Army provided in the record. R. at 89.

Reviewing courts should accord an agency's interpretation of its own regulations a "high level of deference," and defer to that interpretation "unless it is plainly wrong." Gen. Carbon Co. v. OSHRC, 860 F.2d 479, 483 (D.C.Cir.1988). This standard of deference requires a court to defer to an agency's interpretation of a rule even when that interpretation diverges from what a first-time reader might conclude was the "best" interpretation of the regulation. Gen. Elec. Co. v. Environ. Prot. Agency, 53 F.3d 1324, 1327 (D.C.Cir.1995).

The Army's January 30, 2006, denial letter states:

> 1. The DA [Department of the Army] Conscientious Objector Review Board (DACORB) has reviewed the application of PFC Agustin Aguayo for Conscientious Objector Status (CORB).
>
> 2. After thorough examination of the Case Record, the DACORB determined that the applicant did not present clear and convincing evidence, IAW 600-43, that the applicant's stated beliefs warrant award of 1-O status.
>
> 3. A copy of the case record will be included in the OMPF, CMIF, and MPRJ IAW AR 640.10.

The record also contains the minutes of the DACORB meeting regarding Aguayo's application, including handwritten notes by the two board members who voted to deny Aguayo's application. R. at 87-89. The Chaplain's notes state that "SPC Aguayo does not demonstrate a clear, convincing evidence of a fixed, firm, and crystallized burden of proof. Applicant has not established, by clear

and convincing evidence, that the nature of the claim comes within the definition of criteria IAW AR 600-43." R. at 88. The DACORB President's notes state that "Applicant has not demonstrated clear and convincing evidence of a firm fixed belief." R. at 88. On March 24, 2006, the DACORB issued a supplemental memorandum,[1] stating:

> *34 Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs
>
> Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status
>
> It appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army
>
> Questionable timing of the application just prior to unit deployment

Opp'n, Ex. B.

On its face, the regulation only requires that the Army provide reasons for the denial of an application for discharge based on conscientious objection; it does not require an exhaustive list. Courts are limited to

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[1] Petitioner also argues that the memorandum from the Board President dated March 24, 2006 is improper. Contrary to petitioner's claim, the memorandum is part of the record. The DACORB simply decided to provide further reasons for its decision. The facts supporting the memorandum are also in the administrative record.

determining whether the "record reveals 'some proof that is incompatible with the applicant's claim'" See Roby v. U.S. Dep't of the Navy, 76 F.3d 1052, 1058 (9th Cir.1996) (citing Woods v. Sheehan, 987 F.2d 1454, 1456 (9th Cir.1993)). In light of the deference owed to the military's personnel decisions and interpretations of its regulations, this is the "narrowest review known to the law." Woods, 987 F.2d at 1456. The Army argues that the January 30, 2006, denial letter, the minutes of the DACORB meeting, and the March 24, 2006 memorandum satisfy the regulatory requirement. This interpretation is reasonable, and therefore entitled to deference. Accordingly, the Court concludes that the Army complied with AR 600-43 ¶ 2-8(d).

CONCLUSION

For the reasons stated herein, the Court will deny Aguayo's petition.

A separate Order will issue this date.

ORDER

Upon consideration of petitioner's amended petition for writ of habeas corpus [10], the applicable law, and the entire record herein, it is hereby

ORDERED that petitioner's amended petition for writ of habeas corpus is DENIED and this case shall stand DISMISSED with PREJUDICE. It is further

ORDERED that petitioner's motion [18] for leave to file a "rebuttal" to respondent's "reply" to petitioner's traverse to respondent's opposition to petition for a writ of habeas corpus is GRANTED. It is further

ORDERED that petitioner's motions [22] for preliminary injunction and temporary restraining order [24] are DENIED as moot.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 06-5241 **September Term, 2006**
05cv01580

Filed On:
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUN 7 2007
CLERK

Agustin Aguayo,
Appellant

v.

Pete Geren, Secretary of the Army,
Appellee

BEFORE: Ginsburg, Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed April 30, 2007, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 06-5241 **September Term, 2006**
05cv01580

Filed On:
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUN 7 2007
CLERK

Agustin Aguayo,
Appellant

v.

Pete Geren, Secretary of the Army,
Appellee

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s
Michael C. McGrail
Deputy Clerk

APPENDIX D

[Code of Federal Regulations]
[Title 32, Volume 1]
[Revised as of July 1, 2006]
From the U.S. Government Printing Office via GPO Access
[Page 436]

TITLE 32--NATIONAL DEFENSE
CHAPTER I--OFFICE OF THE SECRETARY OF DEFENSE
PART 75 CONSCIENTIOUS OBJECTORS --
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75.7 Action after decision.
75.8 Claims of erroneous induction.
75.9 Required information to be supplied by applicants for discharge or noncombatant service.
75.10 Statement (counseling concerning Veterans Administration benefits).
75.11 Statement (counseling concerning designation as conscientious objector).

Authority: Sec. 552 of title 5, United States Code.

Source: 36 FR 22231, Nov. 23, 1971, unless otherwise noted.

75.1 Purpose

This part updates uniform Department of Defense procedures governing conscientious objectors and processing requests for discharge based on conscientious objection.

Sec. 75.2 Applicability and scope.

The provisions of this part apply to the military departments and govern the personnel of the Army, Navy, Air Force, and Marine Corps and all Reserve components thereof.

[Page 436-437]

Sec. 75.3 Definitions.

(a) Conscientious objection -- General. A firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief.

(1) Class 1-O conscientious objector. A member, who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

(2) Class 1-A-O conscientious objector. A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status.

Unless otherwise specified, the term "conscientious objector" includes both 1-O and 1-A-O conscientious objectors.

(b) Religious training and belief. Belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect

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moral well-being. The external power or being need not be of an orthodox deity, but may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or, in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious conviction. The term "religious training and belief" may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as ``religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and belief" does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political views.

(c) Noncombatant service or noncombatant duties (1-A-O) (used interchangeably herein). (1) Service in any unit of the Armed Forces which is unarmed at all times.

(2) Service in the medical department of any of the Armed Forces, wherever performed.

(3) Any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

(4) Service aboard an armed ship or aircraft or in a combat zone shall not be considered to be combatant duty unless the individual concerned is personally and directly involved in the operation of weapons.

(d) Noncombatant training. Any training which is not concerned with the study, use or handling of arms or weapons.

[Page 437-438]

Sec. 75.4 Policy.

(a) Administrative discharge prior to the completion of an obligated term of service is discretionary with the military service concerned, based on a judgment of the facts and circumstances in the case. However, insofar as may be consistent with the effectiveness and efficiency of the military services, a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable within the following limitations:

(1) Except as provided in paragraph (a)(2) of this section, no member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a conscientious objector if

(i) (a) Such beliefs satisfied the requirements for classification as a conscientious objector pursuant to section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456(j)) and other provisions of law, and (b) he failed to request classification as a conscientious objector by the Selective Service System; or

(ii) (a) He requested classification as a conscientious objector before entering military service, and (b) such request was denied on the merits by the Selective Service System, and (c) his request for classification as a conscientious objector is based upon essentially the same grounds, or supported by essentially the same evidence, as the request which was denied by the Selective Service System.

(2) Nothing contained in this part renders ineligible for classification as a conscientious objector a member of the Armed Forces who possessed conscientious objector beliefs before entering military service if (i) such beliefs crystal-

ized after receipt of an induction notice; and (ii) he could not request classification as a conscientious objector by the Selective Service System because of Selective Service System regulations prohibiting the submission of such requests after receipt of induction notice.

(b) Because of the personal and subjective nature of conscientious objection, the existence, honesty, and sincerity of asserted conscientious objection beliefs cannot be routinely ascertained by applying inflexible objective standards and measurements on an "across-the-board" basis. Requests for discharge or assignment to noncombatant training or service based on conscientious objection will, therefore, be handled on an individual basis with final determination made at the headquarters of the military service concerned in accordance with the facts and

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circumstances in the particular case and the policy and procedures set forth herein.

Sec. 75.5 Criteria.

General. The criteria set forth herein provide policy and guidance in considering applications for separation or for assignment to noncombatant training and service based on conscientious objection.

(a) Consistent with the national policy to recognize the claims of bona fide conscientious objectors in the military service, an application for classification as a conscientious objector may be approved (subject to the limitations of Sec. 75.4(a)) for any individual:

(1) Who is conscientiously opposed to participation in war in any form;

(2) Whose opposition is founded on religious training and beliefs;

and

(3) Whose position is sincere and deeply held.

(b) War in any form: The clause "war in any form" should be interpreted in the following manner:

(1) An individual who desires to choose the war in which he will participate is not a conscientious objector under the law. His objection must be to all wars rather than a specific war;

(2) A belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in "war" within the meaning of this part.

(c) Religious training and belief:

(1) In order to find that an applicant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious convictions, the applicant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth and duration have directed the lives of those whose beliefs are clearly found in traditional religious convictions. In other words, the belief upon which conscientious objection is based must be the primary controlling force in the applicant's life.

(2) A primary factor to be considered is the sincerity with which the belief is held. Great care must be exercised in seeking to determine whether asserted beliefs are honestly and genuinely held. Sincerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present. Care must be exercised in determining the integrity of belief and the consistency of application.

Information presented by the claimant should be sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate

that expediency or avoidance of military service is not the basis of his claim.

(i) Therefore, in evaluating applications the conduct of applicants, in particular their outward manifestation of the beliefs asserted, will be carefully examined and given substantial weight.

(ii) Relevant factors that should be considered in determining an applicant's claim of conscientious objection include: Training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; credibility of the applicant; and credibility of persons supporting the claim.

(iii) Particular care must be exercised not to deny the existence of bona fide beliefs simply because those beliefs are incompatible with one's own.

(a) Church membership or adherence to particular theological tenets are not required to warrant separation or assignment to noncombatant training and service for conscientious objectors.

(b) Mere affiliation with a church or other group which advocates conscientious objection as a tenet of its creed is not necessarily determinative of an applicant's position or belief.

(c) Conversely, affiliation with a church or group which does not teach conscientious objection does not necessarily rule out adherence to conscientious objection beliefs in any given case.

(d) Where an applicant is or has been a member of a church, religious organization, or religious sect, and where his claim of conscientious objection is related to such

membership, inquiry may properly be made as to the fact of

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membership, and the teaching of the church, religious organization, or religious sect, as well as the applicant's religious activity. However, the fact that the applicant may disagree with, or not subscribe to, some of the tenets of his church does not necessarily discredit his claim. The personal convictions of each individual will be controlling so long as they derive from his moral, ethical or religious beliefs.

(c) Moreover, an applicant who is otherwise eligible for conscientious objector status may not be denied that status simply because his conscientious objection influences his views concerning the Nation's domestic or foreign policies. The task is to decide whether the beliefs professed are sincerely held, and whether they govern the claimant's actions in both word and deed.

(d) The burden of establishing a claim of conscientious objection as a ground for separation or assignment to noncombatant training and service is on the applicant. To this end, he must establish by clear and convincing evidence: (1) That the nature or basis of his claim comes within the definition of and criteria prescribed herein for conscientious objection, and (2) that his belief in connection therewith is honest, sincere and deeply held. The claimant has the burden of determining and setting forth the exact nature of his request, i.e., whether for separation based on conscientious objection (1-O) or for assignment to noncombatant training and service based on conscientious objection (1-A-O).

(e) An applicant claiming 1-O status shall not be granted 1-A-O status as a compromise.

(f) Persons who were classified 1-A-O by Selective Service prior to induction shall upon induction be transferred to a

training center, or station, for recruit training, and shall be subject to noncombatant service or training. They will be required to sign and date a statement as set forth in the form in Sec. 75.11. Thereafter, upon completion of recruit training, they shall be assigned to noncombatant duty. They may be transferred to the medical corps, or a medical department or unit for further training, provided they meet the requirements therefor. Such persons when assigned to medical units will not be allowed to avoid the important or hazardous duties which are part of the responsibility of all members of the medical organization. Any person who does not meet the requirements for this training, who fails to complete the prescribed course of instruction, or who otherwise cannot be assigned to this duty will be assigned to other noncombatant duties.

(g) Commanders at levels directed by the service headquarters are authorized to return to an applicant, without action, any second or subsequent application that is based upon essentially the same grounds, or supported by essentially the same evidence, as a previous application disapproved by the military service concerned.

(h) The provisions of this part will not be used to effect the administrative separation of individuals who do not qualify as conscientious objectors, or in lieu of administrative separation procedures such as those provided for unsuitability or unfitness or as otherwise set forth in part 41 of this title. Individuals determined not qualified for conscientious objector status, but the separation of whom would otherwise appear to be in the best interest of the Armed Forces, should be considered for administrative separation under the provisions of part 41 of this title. Under no circumstances will administrative separation of these individuals be effected pursuant to this part.

(i) Nothing in this part prevents the administrative elimination, pursuant to law and regulations of the

military department concerned, of any officer whose classification as a 1-A-O conscientious objector results in substandard performance of duty or other cause for elimination.

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Sec. 75.6 Procedure.

(a) A member of the Armed Forces who seeks either separation or assignment to noncombatant duties by reason of conscientious objection will submit an application therefor. The applicant will indicate whether he is seeking a discharge or assignment to noncombatant duties and will include the following terms:

(1) The personal information required by Sec. 75.9.
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(2) Any other items which the applicant desires to submit in support of his case.

(b) Prior to processing the application of the individual, he will be (1) advised of the specific provisions of section 3103 of title 38, United States Code[1] regarding the possible effects of discharge as a conscientious objector who refuses to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of

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[1] 38 U.S.C. 3103 provides, in pertinent part, that the discharge of any person on the grounds that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such persons under law administered by the Veterans' Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane.

competent military authority, and (2) required to execute the statement in Sec. 75.10.

(c) The applicant shall be personally interviewed by a chaplain who shall submit a written opinion as to the nature and basis of the applicant's claim, and as to the applicant's sincerity and depth of conviction. The chaplain's report shall include the reasons for his conclusions. In addition, the applicant will be interviewed by a psychiatrist (or by a medical officer if a psychiatrist is not reasonably available) who shall submit a written report of psychiatric evaluation indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels, or such character or personality disorder as to warrant recommendation for appropriate administrative action. This opinion and report will become part of the case file. If the applicant refuses to participate or is uncooperative or unresponsive in the course of the interview, this fact will be included in the statement and report filed by the chaplain and psychiatrist or medical officer.

(d) Commanders at levels directed by the Service Headquarters will appoint an officer in the grade of O-3 or higher to investigate the applicant's claim. The officer so appointed will not be an individual in the chain of command of the applicant. If the applicant is a commissioned officer, the investigating officer must be senior in both temporary and permanent grades to the applicant.

(1) Upon appointment, the investigating officer will review the applicable service regulations which implement this part. During the course of his investigation, the investigating officer will obtain all necessary legal advice from the local Staff Judge Advocate or legal officer.

(2) The investigating officer will conduct a hearing on the application. The purpose of the hearing is: To afford

the applicant an opportunity to present evidence he desires in support of his application; to enable the investigating officer to ascertain and assemble all relevant facts; to create a comprehensive record; and to facilitate an informed recommendation by the investigating officer and an informed decision on the merits by higher authority. In this regard, any failure or refusal of the applicant to submit to questioning under oath or affirmation before the investigating officer may be considered by the officer making his recommendation and evaluation of the applicant's claim. If the applicant fails to appear at the hearing without good cause, the investigating officer may proceed in his absence and the applicant will be deemed to have waived his appearance.

(i) If the applicant desires, he shall be entitled to be represented by counsel, at his own expense, who shall be permitted to be present at the hearings, assist the applicant in the presentation of his case, and examine all items in the file.

(ii) The hearing will be informal in character and will not be governed by the rules of evidence employed by courts-martial except that all oral testimony presented shall be under oath or affirmation. Any relevant evidence may be received. Statements obtained from persons not present at the hearing need not be made under oath or affirmation. The
hearing is not an adversary proceeding.

(iii) The applicant may submit any additional evidence that he desires (including sworn or unsworn statements)
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and present any witnesses in his own behalf, but he shall be responsible for securing their attendance. The installation or local commander will render all reasonable assistance in making available military members of his

command requested by the applicant as witnesses. Further, the applicant will be permitted to question any other witnesses who appear and to examine all items in the file.

(iv) A verbatim record of the hearing is not required. If the applicant desires such a record and agrees to provide it at his own expense, he may do so. If he elects to provide such a record, he shall make a copy thereof available to the investigating officer, at no expense to the Government, at the conclusion of the hearing. In the absence of a verbatim record, the investigating officer will summarize the testimony of witnesses and permit the applicant or his counsel to examine the summaries and note for the record their differences with the investigating officer's summary. Copies of statements and other documents received in evidence will be made a part of the hearing record.

(3) At the conclusion of the investigation, the investigating officer will prepare a written report which will contain the following:

(i) A statement as to whether the applicant appeared, whether he was accompanied by counsel, and, if so, the latter's identity, and whether the nature and purpose of the hearing were explained to the applicant and understood by him.

(ii) Any documents, statements and other material received during the investigation.

(iii) Summaries of the testimony of the witnesses presented (or a verbatim record of the testimony if such record was made).

(iv) A statement of the investigating officer's conclusions as to the underlying basis of the applicant's conscientious objection and the sincerity of the applicant's beliefs, including his reasons for such conclusions.

(v) Subject to Sec. 75.5(e), the investigating officer's recommendations for disposition of the case, including his

reasons therefor. The actions recommended will be limited to the following:

(a) Denial of any classification as a conscientious objector; or

(b) Classification as 1-A-O conscientious objector; or

(c) Classification as 1-O conscientious objector.

(vi) The investigating officer's report, along with the individual's application, all interviews with chaplains or doctors, evidence received as a result of the investigating officer's hearing, and any other items submitted by the applicant in support of his case will constitute the record. The investigating officer's conclusions and recommended disposition will be based on the entire record and not merely on the evidence produced at the hearings. A copy of the record will be furnished to the applicant at the time it is forwarded to the commander who appointed the investigating officer, and the applicant will be informed that he has the right to submit a rebuttal to the report within the time prescribed by the military service concerned.

(e) The record of the case will be forwarded to the headquarters of the officer who appointed the investigating officer where it shall be reviewed for completeness and legal sufficiency. If necessary, the case may be returned to the investigating office for further investigation. When the record is complete, the authority who appointed the investigating officer shall forward it with his personal recommendation for disposition, and the reasons therefor, through the appropriate chain of command to headquarters of the military service concerned.

(f) The headquarters of the military service concerned will make a final decision based on the entire record. Any additional information other than the official service record of the applicant considered by the headquarters of

the military service concerned which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant shall be given an opportunity to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.
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(g) Processing of applications need not be abated by the unauthorized absence of the applicant subsequent to the initiation of the application, or by the institution of disciplinary action or administrative separation proceedings against him. However, an applicant whose request for classification as a conscientious objector has been approved will not be discharged until all disciplinary action has been resolved.

(h) To the extent practicable under the circumstances, during the period applications are being processed and until a decision is made by the headquarters of the service concerned, every effort will be made to assign applicants to duties within the command to which they are assigned which will conflict as little as possible with their asserted beliefs. However, members desiring to file application who are on orders for reassignment may be required by the military service concerned to submit applications at their next permanent duty station. During the period applications are being processed, applicants will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Applicants may be disciplined for violations of the Uniform Code of Military Justice while awaiting action on their applications.

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Sec. 75.7 Action after decision.

(a) Applicants requesting discharge who are determined to be 1-O conscientious objectors by the headquarters of the service concerned will be discharged for the convenience of the Government with entry in personnel records and discharge papers that the reason for separation is conscientious objection. The type of discharge issued will be governed by the applicant's general military record and the pertinent provisions of part 41 of this title. The Director of the Selective Service System will be promptly notified of the discharge of those who have served less than one hundred and eighty (180) days in the Armed Forces. Pending separation, the applicant will continue to be assigned duties providing the minimum practicable conflict with his professed beliefs and will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which he is assigned. Applicants may be disciplined for violations under the Uniform Code of Military Justice while awaiting discharge.

(b) Applicants requesting assignment to noncombatant duties who are determined to be class 1-A-O conscientious objectors by the military department shall be (1) assigned to noncombatant duty as defined in Sec. 75.3, or (2) discharged from military service or released from active duty, at the discretion of the military department. Each applicant will be required to execute the statement in Sec. 75.11.

(c) Persons who are assigned to noncombatant duties, and persons who are assigned to normal military duties by reason of disapproval of their applications, will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties

to which they are assigned. Violations of the Uniform Code of Military Justice by these members will be treated as in any other situation.

* * * *

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Sec. 75.9 Required information to be supplied by applicants for discharge or noncombatant service.

Each person seeking release from active service from the Armed Forces, or assignment to noncombatant duties, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the military departments from requiring such additional information as they desire. The individual may submit such other information as desired.

(a) General information concerning applicant.

(1) Full name.

(2) Military serial number; and social security account number.

(3) Selective service number.

(4) Service address.

(5) Permanent home address.

(6) Name and address of each school and college attended (after age 16) together with the dates of attendance, and the type of school (public, church, military, commercial, etc.).

(7) A chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college (after age 16) whether for monetary compensation or not. Include the type of work, name of employer, address of employer and the from/to date for each position or job held.

(8) All former addresses (after age 16) and dates of residence at those addresses.

(9) Parents' names and addresses. Indicate whether they are living or deceased.

(10) The religious denomination or sect of both parents.

(11) Was application made to the Selective Service System (local board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

(12) When the applicant has served less than one hundred and eighty (180) days in the military service, a statement by him as to whether he is willing to perform work under the selective service civilian work program for conscientious objectors, if discharged as a conscientious objector. Also, a statement of the applicant as to whether he consents to the issuance of an order for such work by his local Selective Service Board.

(b) Training and belief. (1) A description of the nature of the belief which requires the applicant to seek separation from the military service or assignment to noncombatant training and duty for reasons of conscience.

(2) An explanation as to how his beliefs changed or developed, to include an explanation as to what factors (how, when and from whom or from what source training received and belief acquired) caused the change in or development of conscientious objection beliefs.

(3) An explanation as to when these beliefs became incompatible with military service, and why.

(4) An explanation as to the circumstances, if any, under which the applicant believes in the use of force, and to what extent, under any foreseeable circumstances.

(5) An explanation as to how the applicant's daily lifestyle has changed as

a result of his beliefs and what future actions he plans to continue to support his beliefs.

(6) An explanation as to what in applicant's opinion most conspicuously demonstrates the consistency and depth of his beliefs which gave rise to his claim.

(c) Participation in organizations. (1) Information as to whether applicant has ever been a member of any military organization or establishment before entering upon his present term of service. If so, the name and address of such organization will be given together with reasons why he became a member.

(2) A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

(i) The name of the sect, and the name and location of its governing body or head, if known.

(ii) When, where, and how the applicant became a member of said sect or organization.

(iii) The name and location of any church, congregation or meeting which the applicant customarily attends, and the extent of the applicant's active participation therein.

(iv) The name, title, and present address of the pastor or leader of such church, congregation or meeting.

(v) A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

(3) A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organizations.

(d) References. Any additional information, such as letters of reference or official statements of organizations to which the applicant belongs or refers in his application,

that the applicant desires to be considered by the authority reviewing his application. The burden is on the applicant to obtain and forward such information.

* * * *

3

2-5-08

No. 07-607

In the Supreme Court of the United States

AGUSTIN AGUAYO, PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in considering whether petitioner's stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated in determining whether the Department of the Army Conscientious Objector Review Board (Board) had a basis in fact for denying petitioner's conscientious objector application.

2. Whether the court of appeals erred in holding that the Board had a basis in fact for denying petitioner's conscientious objector application.

3. Whether the court of appeals erred in considering a supplemental memorandum filed by the Army in the district court further explaining its decision to deny petitioner's conscientious objector application.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 476 F.3d 971. The opinion of the district court (Pet. App. B1-B10) is reported at 445 F. Supp. 2d 29.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2007. A petition for rehearing was denied on June 7, 2007. On August 29, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 4, 2007, and the petition was filed on November 5, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is the policy of the United States military to grant conscientious objector status to current service members who have a "firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief." Department of Defense Instruction 1300.06 § 3.1 (May 5, 2007) (Instruction 1300.06) <http://www.dtic.mil/whs/directives/corres/ins1.html>; see also Army Reg. 600-43, Glossary Section II (Aug. 21, 2006) (defining "conscientious objection") <http://www.apd.army.mil/pdffiles/r600_43. pdf>.[1] A person who, by reason of conscientious objection, sincerely objects to military service in any form is known as a "Class 1-0 Conscientious Objector" and is discharged from service. Instruction 1300.06 § 3.1.1. However, "no member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a Conscientious Objector." *Id.* § 4.1.1.

The term "religious training and belief" is defined by regulation as a "[b]elief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being" and "may include solely moral or ethical beliefs" in addition to traditionally "religious" beliefs. Army Reg. 600-43, Glossary II; see Instruction 1300.06

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[1] Both petitioner and the court of appeals refer to 32 C.F.R. 75.1-75.11, where Department of Defense Instruction 1300.06 was formerly codified. Those provisions, however, were removed as duplicative in June 2007. See 72 Fed. Reg. 33,677 (2007). Accordingly, this brief refers only to the provisions in Instruction 1300.06 and Army Regulation 600-43 and not the removed provisions of the Code of Federal Regulations.

§ 3.2 (similar). In determining whether a conscientious objection is founded on "religious training and belief," the Army considers whether the asserted beliefs "are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them." Army Reg. 600-43, Glossary II.

In evaluating a conscientious objector application, the Army considers several factors, including:

> training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; [and] credibility of persons supporting the claim.

Army Reg. 600-43 ¶ 1-5*a*(5)(*b*).

A member of the Army seeking conscientious objector status must submit an application and exhaust an administrative review process. See Pet. App. A3-A5, A16; Army Regulation 600-43, ¶¶ 2-2 to 2-8. At the conclusion of the review process, the Department of the Army Conscientious Objector Review Board (Board) makes the Army's final determination on the application. *Id.* ¶¶ 2-8. If that determination is challenged in federal court, the reviewing court must uphold the Board's decision unless it has "no basis in fact." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

2. In 2002, petitioner voluntarily joined the Army, committing to eight years of service with four years of active duty. In February 2004, shortly before he was deployed to Iraq, petitioner applied for a conscientious

objector discharge. Pet. App. A2. In his application, petitioner explained: "My moral view does not allow me to take the life of another human being" and "[my] progressive training in arms and other military operations have progressively, and from the very beginning, caused me great anguish and guilt." *Id.* at A3.

Army officials undertook a review of petitioner's claim. An Army chaplain concluded that petitioner "seem[ed] to be sincere" but that "it [wa]s difficult to assess the depths of his beliefs because they rest solely with[in] his own thinking and personal values." Pet. App. A3. He also noted that "the timing of [petitioner's] request makes it questionable." *Ibid.* An investigating officer was appointed, and he held a hearing in Tikrit, Iraq, where petitioner and four witnesses testified. *Ibid.* Although the investigating officer recommended that petitioner's application be granted, four officers in petitioner's chain of command who reviewed the application recommended that it be denied. One officer concluded that petitioner's "pursuit of conscientious objector status [wa]s an attempt to remedy his anxiety all soldiers face during an extended deployment in a combat theater of operations." *Id.* at A4. Another officer noted he "d[id] not believe that [petitioner's] belief [wa]s consistent w[ith] conscientious objection." *Ibid.*

The Staff Judge Advocate reviewing petitioner's application also recommended that it be denied, explaining that petitioner "did not identify any specific ways he has altered his behavior to accommodate his beliefs" or any "significant source of his beliefs other than he was raised in a kind and respectful family." Pet. App. A4-A5. And he noted that "the timing of [petitioner's] application raises doubts as well." *Ibid.* At the conclusion of

the administrative review process, the Board issued a decision denying petitioner's application. *Id.* at A5.

3. Petitioner filed a habeas corpus petition in federal district court, seeking discharge from the Army as a conscientious objector. See 28 U.S.C. 2241 (2000 & Supp. V 2005); *Parisi* v. *Davidson*, 405 U.S. 34, 39 (1972). The parties agreed to stay proceedings to permit petitioner to submit additional evidence to the Board and for the Board to consider that evidence and review petitioner's entire application *de novo*. Pet. App. A5. Petitioner stated in his additional submission that his "convictions are strong and are deeply rooted based on [his] upbringing, morals, and the experiences [he] ha[s] had in the army." *Ibid.* The Board again denied petitioner's application. *Id.* at A6.

Petitioner then filed an amended habeas petition with the district court. The Army opposed the petition and filed a supplemental memorandum further elaborating the Board's basis for denying petitioner's application. The supplemental memorandum listed the following reasons for the Board's decision:

> Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs.
>
> Applicant has not provided any significant source of his beliefs; conscience or moral view that would warrant Conscientious Objector status.
>
> Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.

> Questionable timing of the application just prior to unit deployment.

Pet. App. A6-A7.

The district court denied the petition for a writ of habeas corpus. Pet. App. B1-B10. As a starting point, it noted that internal military personnel decisions "are afforded substantial deference"; a court reviewing a denial of conscientious objector status "does not weigh the evidence or test whether substantial evidence supports the military's position" but instead asks only whether the Board's decision "had some basis in fact." *Id.* at B4-B5.

The court then determined that the Board's decision had ample basis in fact. After surveying the record, it stated that petitioner "d[id] not identify any religious training or belief that would justify conscientious objector status," and his "beliefs do not appear to be grounded in religious principles or developed through activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated." Pet. App. B6. The court also noted that "the timing of [petitioner's] application is suspect" because petitioner submitted his application shortly after his unit was informed of a pending deployment to Iraq. *Id.* at B6-B7. And it concluded from the record that petitioner's beliefs arose prior to his enlistment, making him ineligible for conscientious objector status. *Id.* at B7.

The district court also rejected petitioner's argument that the Army failed to follow its own regulations, which require it to provide an applicant who is denied conscientious objector status with the reasons for its decision. Pet. App. B7-B10. The court reasoned that the Board's denials of petitioner's application, the minutes of the

Board's meeting at which the application was considered, and the Board's supplemental memorandum together satisfied that requirement. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A20. It first rejected petitioner's argument that district court erred in considering the Board's supplemental memorandum. *Id.* at A8-A11. The court acknowledged that judicial review of an administrative decision "is generally limited to the existing administrative record," but it found that the supplemental memorandum could be considered because, if the memorandum were excluded and the remaining record were found insufficient, the proper course would be to remand to the Army for an additional explanation, which is exactly what the supplemental memorandum provides. *Id.* at A8-A9. Further, the court held, the supplemental memorandum was properly considered under Habeas Corpus Rule 7 (28 U.S.C. 2254 rule 7), which provides that "the judge may direct the parties to expand the record by submitting additional materials relating to the petition." *Id.* at A9. Moreover, the court explained that the supplemental memorandum did not present new evidence; instead, it listed reasons for the Board's decision based on the evidence already in the record. *Id.* at A10. Finally, the court rejected petitioner's argument that the memorandum should be excluded because it did not comply with Army regulations. *Id.* at A10-A11.

On the merits, the court of appeals noted the "extremely narrow" standard of review, under which the court could reverse only if the Board's decision "ha[d] 'no basis in fact.'" Pet. App. A12 (quoting *Witmer* v. *United States*, 348 U.S. 375, 381 (1955)). The court then concluded that the Army had ample basis in fact for denying petitioner's application. *Id.* at A14. While "[n]o

single fact or statement is dispositive," the court of appeals found that "based on the entire record" the Board could conclude that petitioner did not meet his burden that he qualifies as a conscientious objector. *Id.* at A18. It pointed to the Board's conclusions that petitioner "lacked the 'religious foundation' or 'underpinning' required," that he "had not adequately explained the source of his claimed beliefs," that he "appeared to hold his beliefs prior to enlistment," and that "the timing of [petitioner's] application was suspect." *Id.* at A16.

Although petitioner asserted that his moral view does not allow him to take another life, the court noted that the Army "is entitled to require more than mere assertions of belief," and it concluded that here the record supports inferences that contradict petitioner's asserted beliefs. Pet. App. A17. For instance, Army officials who reviewed petitioner's application concluded that petitioner "did not identify any specific ways he has altered his behavior to accommodate his beliefs" and "expressed doubts as to the depth and source of [petitioner's] convictions." *Id.* at A18. In the court's view, petitioner's "own application materials" cast doubt on his claims, because they failed to show that his beliefs developed through "activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated," Army Reg. 600-43 ¶ 1-5*a*(5)(*b*), or that those asserted beliefs "[we]re the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them," Army Reg. 600-43, Glossary Section II. Pet. App. A18-A19. Moreover, the court stated that petitioner's explanation that his beliefs were premised on his religious upbringing suggested that they existed prior to his enlistment. *Ibid.* Finally, the

court noted that petitioner's application was made "just days before his deployment to Iraq," and while that suspicious timing could not by itself support denying the application, the Board could nonetheless consider that factor in reviewing petitioner's application. *Id.* at A19.

ARGUMENT

The courts below carefully considered and unanimously rejected petitioner's habeas petition challenging the Army's refusal to grant petitioner a conscientious objector discharge. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner's fact-bound contentions are without merit and do not warrant further review in this Court. Accordingly, the petition should be denied.

1. Petitioner first contends (Pet. 16-21) that the court of appeals erred in considering whether his stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated. That contention is without merit, and does not implicate any disagreement in the circuits warranting review.

a. First, petitioner is mistaken in asserting (Pet. 17-18) that the court of appeals looked only to whether petitioner developed his stated beliefs through "study or contemplation" in upholding the Board's decision. As the court of appeals expressly noted, Army regulations provide "a list of factors to be considered" in determining whether an applicant has met his burden of establishing eligibility for conscientious objector status. Pet. App. A15. The court of appeals found that the Board's decision had a "basis in fact" not just because the development of petitioner's stated beliefs lacked rigor and

dedication, but also because of the suspect timing of petitioner's application; because his conscientious objection appeared to have existed at the time of his enlistment; and because his asserted beliefs were not "the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them." *Id.* at A18-A19 (quoting Army Reg. 600-43, Glossary II).

Although petitioner contends that the challenged factor "alone cannot be a reason to deny his application," Pet. 20, and that the court of appeals "turned [it] into a *sine qua non*," Pet. 18, the court below was in fact careful to observe that "[n]o single fact or statement is dispositive," and it reached its conclusion "based on the entire record" and not on one factor alone, Pet. App. A18. Indeed, petitioner concedes that under the Army's regulation, this factor is "simply one of a half dozen" relevant factors to consider, Pet. 17, and that is precisely how the Board and the court of appeals treated the matter. Thus, even if the challenged factor were stricken, the Board's decision would be supported by the other remaining, valid factors considered by the Board.

b. Petitioner also contends (Pet. 16) that the court of appeals' reliance on the factor regarding how he developed his stated beliefs violates the Establishment Clause and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.* Petitioner did not press this argument below,[2] it was not passed on by the

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[2] A single sentence in a footnote of petitioner's opening brief refers to RFRA and the Free Exercise Clause (but not the Establishment Clause) in support of a different argument (that the Army's regulation recognizing that moral or ethical beliefs, not just religious beliefs, can be the basis for a conscientious objection). See Pet. C.A. Br. 37 n.15. And even with respect to that different argument, petitioner conceded

court of appeals, and thus it is not properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari only when the question presented was not * * * passed upon below.") (internal quotation marks omitted). For that reason alone, the Court should decline to consider petitioner's claim.

In any event, petitioner's argument lacks merit. The challenged regulation does not create a "preference [for] one form of religion over another," Pet. 17. The Army's regulation addresses only whether the applicant's stated beliefs were developed by the kind of "rigor and dedication" that would lead the Board to conclude that the applicant's stated beliefs are sincerely held. That factor simply tests the sincerity of an applicant's stated beliefs; it does not prefer one religion or set of beliefs over another, nor does it prefer religion over non-religion. Indeed, the Army's regulation does not require the applicant's conscientious objection to be based on religion at all. See Army Reg. 600-43, Glossary II ("The term 'religious training and belief' may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not religious.").

Petitioner is likewise mistaken in contending (Pet. 17) that the court of appeals required that he develop his beliefs in a "particular manner." Both the court of appeals (Pet. App. A18) and the Army (see Army Reg. 600-43 ¶ 1-5*a*(5)(*b*)) acknowledged that an applicant's stated beliefs may be developed in any number of ways,

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there was no First Amendment or RFRA violation. *Ibid.* Petitioner's reply brief, moreover, expressly disclaimed any RFRA argument. See Pet. C.A. Reply Br. 8 n.4.

as "through training, study, contemplation, *or other activity* comparable in rigor and dedication." Army Reg. 600-43 ¶ 1-5*a*(5)(*b*) (emphasis added).

c. Contrary to petitioner's contention (Pet. 18), there is no disagreement among the circuits regarding the weight to be given to the process by which an applicant for conscientious objector status developed his beliefs. None of the cases petitioner cites considers whether reliance on this factor violates the Establishment Clause or RFRA. Instead, each decision simply represents an application of the Army's regulations to the facts of a particular applicant's case. And the decision below has none of the deficiencies that other courts have identified with Board decisions denying conscientious objector status. For example, in *Lobis* v. *Secretary of the Air Force*, 519 F.2d 304, 307 (1st Cir. 1975), the Board erred in relying exclusively on an applicant's suspicious timing to deny his application. In this case, by contrast, the court of appeals permissibly viewed timing as just one of many factors supporting the Board's conclusion. Pet. App. A18-A19 (noting that "suspect timing of a CO application is not, in itself, sufficient grounds for its denial").

United States v. *Burton*, 472 F.2d 757, 760 (8th Cir. 1973), *United States* v. *Timmins*, 464 F.2d 385, 387-388 (9th Cir. 1972), and *United States* v. *Stetter*, 445 F.2d 472, 479 (5th Cir. 1971), are also inapt. In those cases, applications were erroneously denied on the basis that the applicant lacked formal or traditional religious training. Here, the Board did not deny petitioner's application because he lacked a particular type of training (religious or otherwise), but because the activities he claimed had led to his beliefs lacked rigor and dedication, and

numerous other factors also undermined his application. Pet. App. A18-A19.[3]

Nor is this case anything like *Kemp* v. *Bradley*, 457 F.2d 627, 629-630 (8th Cir. 1972), where the Board applied the wrong standard in assessing a conscientious objector application and failed to make any factual findings that would have been relevant under the correct standard. See also *Peckat* v. *Lutz*, 451 F.2d 366, 368-370 (4th Cir. 1971) (the Board failed to give any reasons at all for denying the application). In this case, there was ample evidence in the record—including petitioner's "own application materials"—that "provide[d] reason to doubt" petitioner's statements that he qualifies for conscientious objector status. Pet. App. A18-A19.

2. Petitioner contends (Pet. 21-24) that the court of appeals acted "contrary to binding authority" in finding that the Board's decision had a basis in fact. That is incorrect. Contrary to petitioner's contention (Pet. 21-22), the decision below is consistent with this Court's decision in *Witmer* v. *United States*, 348 U.S. 375 (1955). *Witmer* held that a Board's decision to deny conscientious objector status can be overturned only if it has "no basis in fact." *Id.* at 381 (quoting *Estep* v. *United States*, 327 U.S. 114, 122 (1946)). The Court explained that the lower courts should not "sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies."

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[3] In *Hanna* v. *Secretary of the Army*, No. 07-1090, 2008 WL 82233 (1st Cir. Jan. 9, 2008), the court of appeals expressly distinguished this case on its facts, finding it "inapposite" because petitioner "had failed to identify the source of his non-religious objection to war" and "had failed to show that his ethical objection to war had developed through activity comparable in rigor to the processes by which religious convictions are formed." *Id.* at *11.

Id. at 380-381. The court of appeals cited and applied that standard in this case, and it concluded based on "the entire record" that the Board's decision had a basis in fact. Pet. App. A12-A19.

The court of appeals did not err in finding a basis in fact to uphold the denial of petitioner's application. See Pet. 23 (asserting that the Army lacked "concrete evidence to doubt [petitioner's] sincerity"). As explained above, the record evidence amply supports the Board's decision. That evidence suggested to the Board and the court of appeals that the development of petitioner's stated beliefs lacked rigor and dedication; that his conscientious objection appeared to have existed at the time of his enlistment; that his asserted beliefs were not the product of a conscious thought process resulting in a conviction allowing him no choice but to act in accordance with them; and that the timing of his application was suspicious. Pet. App. A6-A7, A18-A19. The court of appeals thus properly "examine[d] the objective facts * * * to see whether they cast doubt on the sincerity of his claim." *Witmer*, 348 U.S. at 382.

Petitioner points to a single sentence in the decision below, which stated that "the Army is entitled to require more than mere assertion of belief." Pet. 21 (quoting Pet. App. A16-A17). Petitioner argues that that statement permits the Army to reject his application because of a bare, unsupported disbelief of his stated convictions. But read in context the sentence simply recognizes that the Army was not required to grant an application simply because an applicant professes certain beliefs, but may test those stated beliefs against the objective record evidence, in line with the factors set forth in the Army's regulations. See Pet. App. A18-A19. That is precisely what the Board and the court of appeals did in

this case, and it is fully consistent with this Court's decision in *Witmer*.[4]

3. Finally, petitioner argues (Pet. 24-25) that the court of appeals erred in considering the supplemental memorandum the Board filed in the district court. Petitioner raises no conflict in the circuits, and this Court thus should decline to consider his case-specific claim.

In any event, the court of appeals did not err in considering the supplemental memorandum. As the court explained, consideration of the memorandum was proper under Habeas Corpus Rule 7 (28 U.S.C. 2254 rule 7), and the memorandum did not contain any new evidence not already in the administrative record. See Pet. App. A9-A10. Petitioner offers no response to these points. Instead, he raises unsubstantiated and meritless claims of "manipulation and abuse" and of violation of his due process rights. Pet. 24. The record reflects that petitioner's application received considerable attention from a number of Army personnel, even though they (like petitioner) were stationed in the midst of the conflict in Iraq. Pet. App. A3-A6. After petitioner filed suit, the Board reconsidered his application *de novo*. *Id.* at A6. In light of the Army's careful consideration of his application, as well as the two layers of judicial review petitioner received, he cannot credibly claim a violation of due process. In light of petitioner's failure to take issue with the court of appeals' reasoning, as well as the absence of any authority to support his claim or any conflict with the decision of this Court or a court of appeals,

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[4] Contrary to petitioner's suggestion (Pet. 22), the decision below is also consistent with *De Walt* v. *Commanding Officer*, 476 F.2d 440 (5th Cir. 1973) (per curiam). The *DeWalt* Court upheld the denial of a conscientious objector application where objective evidence supported the Board's decision. *Id.* at 442. That is precisely what happened here.

petitioner's case-specific claim does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-607

IN THE
SUPREME COURT OF THE UNITED STATES

AGUSTÍN AGUAYO,

Petitioner,

v.

PETE GEREN, Secretary,
Department of the Army,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

This petition presents important questions concerning federal court review of military decisions rejecting applications for discharge on the basis of conscientious objection -- a sensitive subject touching simultaneously on the relationships between civilian and military authority, and between judicial and executive authority, and on the need both to respect the free exercise of religion and to avoid "establishment" violations. Yet the Solicitor General opposes granting the writ here by disregarding the serious issues raised by the decision of the court below and the actual decision of the Army's Conscientious Objector Review Board ("DACORB"), in light of the facts in the record. Instead, the Brief in Opposition relies on a series of casual references to the language of the Army's regulation.

But it is not the regulation as written that petitioner challenges: it is the misapplication in this case of the Department of Defense regulation,[1] together with

[1] Contrary to the respondent's suggestion (BIO 2 n.1), it was petitioner who first brought to this Court's attention that the Defense Department directive governing conscientious objector discharges had been removed from the Code of Federal Regulations. Moreover, it was not "removed as duplicative," id., but rather on the basis that it concerned only internal personnel matters and thus did not require publication. See Letter dated Jan. 16, 2008, from petitioner's counsel to the Clerk, copied to the Solicitor General's office (and transmitted again by electronic mail, at the request of an Assistant to the Solicitor General, on January 25). Moreover, there was nothing inappropriate about the court of appeals' referring to the former 32 C.F.R. part 75 (and none in the

the Army's rules implementing it, which gives rise both to a conflict with this Court's precedent and with the approach taken by other circuits in similar cases. Moreover, as shown in the petition, and as confirmed in the brief of amicus curiae, The Center on Conscience & War, the rationale of the court below raises serious questions under both the First Amendment and the Religious Freedom Restoration Act. None of the respondent's contentions provides a persuasive basis to deny the petition.

1. Respondent Secretary distorts petitioner's argument by claiming that petitioner contends "that the court of appeals erred in considering whether his stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated." BIO 9. Petitioner does not argue that the lower court's error lies in "considering" this; the regulation permissibly invites such consideration. What petitioner contends (and demonstrates) is that the court of appeals erred in approving this as the sole a basis in fact for the denial of discharge. Pet. 17. (This error takes two forms: first, the court below improperly applies the "rigor and dedication" test in a manner which unconstitutionally favors traditional religious claims, and second, it does so without any genuine factual basis in the record. The petition acknowledges that this factor can be considered, if applied properly -- but we insist that it "cannot be turned into a sine qua non." Pet. 18.

(cont'd)

petition's references, either); those provisions were in effect throughout time petitioner's application was being considered, and when the court of appeals rendered its decision.

Respondent asserts that petitioner is "mistaken in asserting" that the court of appeals looked only to whether Aguayo "developed his stated beliefs through 'study or contemplation" in claiming to have found a basis in fact for the Army's denial of the CO discharge application. To support this position, the government first points to the fact that the COA "expressly noted" that the Army regulation provides "a list of factors to be considered." BIO 9. That is true, but beside the point. While the court below did note this fact about the regulation, it upheld the district court's denial of habeas corpus relief -- that is, it found a basis in fact for the DACORB decision -- only by pointing to the manner in which petitioner's beliefs developed (or the way they did not develop).

The government appears to argue that the court below relied for a "basis in fact" not only on petitioner's supposed lack of "rigor and dedication" in his faith development but also on all the other alleged "reasons" given by DACORB for its decision; that is, that petitioner's beliefs "appeared to have existed at the time of his enlistment," that his asserted beliefs were not "the product of a conscious thought process" which "left him with no choice but to act in accordance with them," and because of the asserted "suspect timing" of his claim. BIO 9-10. The government's account of the D.C. Circuit decision does not bear scrutiny.

What the court below concluded was that various Army officers who had "doubts" about these points had some basis for their suspicions. Appx. A19. The court thus suggested that "Aguayo's own application materials provide reason to doubt whether his beliefs developed through 'activity comparable in rigor and dedication to

the processes by which traditional religious convictions are formulated' or 'are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them.'" Appx. A18. But under this Court's precedent, denial of a prima facie valid claim "solely on the basis of suspicion and speculation" is impermissible. Dickinson v. United States, 346 U.S. 389, 397 (1953); see also Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1463 (1st Cir. 1991) (Breyer, J., concurring).

The only one of the Army's "reasons" for denial for which the court below found any basis in fact was DACORB's assertion that his claim "lacks the religious foundation" and that petitioner had not "provided any significant source of his beliefs," Appx. A6, that is, the asserted lack of rigor in petitioner's process of faith development. It is that conclusion which gives rise to the important legal questions presented in this petition.

It is true that under the regulation "rigor" is but one of half a dozen relevant factors that reviewing officers are directed to consider in evaluating whether an asserted moral belief qualifies as equivalent to traditionally religious scruples. This fact in no way undercuts petitioner's argument. DACORB mentioned none of these factors in its memorandum of decision, and the court below relied on only one factor to affirm. Appx. A18-A19. It is also true that the court of appeals was "careful to observe that '[n]o single fact or statement is dispositive,'" and stated that it "reached its conclusion 'based on the entire record' and not one factor alone." Appx. A17. Yet in the end only one point was actually cited and justified factually. Thus, while the COA made this statement, what it apparently meant is that after

reviewing the entire record, the court was convinced that there is was a basis in fact to support the "lack of rigor" reason for denial.

Respondent claims that the Army's decision would in any event "be supported by the other remaining, valid factors considered by the Board," BIO 10, but in truth there are no such "other" factors, that is, not "valid" ones. While the Board gave other "reasons" for the denial of petitioner's claim, the court of appeals did not claim to have found a basis in fact for any of them, and respondent cites none.[2] The D.C. Circuit held that the "DACORB could properly find that the circumstances surrounding Aguayo's application constituted a factor that weighed against its approval," Appx. A19, but the court never held that timing actually provided a basis in fact to deny the application. In fact, the court acknowledges -- as established by the Army's own regulation -- that "suspect timing ... is not, in itself, sufficient grounds for ... denial." Appx. A19.

The court of appeals' contention that the process by which petitioner became a conscientious objector lacked a level of "rigor and dedication" equivalent to that seen in the acquisition of a traditional faith is itself a dubious and unverifiable proposition, not because of any softness in petitioner's process but because the varieties

[2] For example, DACORB claimed that petitioner's pre-enlistment doubts disqualified him, but the district court never relied on that "reason" (see Pet.Appx. B7), and the court of appeals likewise did not endorse it. To the contrary, the court below noted that while petitioner's father was a pacifist, he himself averred that he "was not a conscientious objector when he volunteered for the Army." A18. There is no evidence in the record to the contrary.

of traditional religious experience are so varied. The court of appeals' reliance on this comparison is precisely what gives rise to the constitutional problems highlighted in the petition. It would allow the Army to decide and judge what is and what is not the preferred or acceptable way for someone to develop new religious beliefs.

The government argues that we are "mistaken" in arguing that the Army prefers beliefs developed in a particular way. BIO 12. Respondent points out that the regulation provides for beliefs "developed in any number of ways." Those ways, according to the government are "'training, study, contemplation, or other activity comparable in rigor and dedication.'" BIO 11-12 (emphasis original). Under United States v. Seeger, 380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970), beliefs which are not traditionally considered to be "religious" are nevertheless treated as "religious" under the draft law (upon which the military CO regulations are based). While the regulations does approve of more than one way for a non-religious CO to have his claim approved, he must satisfy the Army that he developed his beliefs through some sort of "rigor and dedication" that is "comparable" to the "training, study [or] contemplation" by which traditional religious beliefs are presumed to be acquired.

As interpreted by the court of appeals, this standard is higher for the non-traditional conscientious objector than for someone who, for example, is born into a Mennonite family and acquires his beliefs through acceptance of family tradition or who is converted by hearing a single, powerful sermon. The court below approved an interpretation of the Defense Department

regulation which prefers beliefs developed in a certain way over beliefs developed some other way. The respondent ignores the obvious constitutional problem, which lies not in the wording of the rule but in its application in petitioner's case by the court below.

2. The government contends that "there is no disagreement among the circuits regarding the weight to be given the process by which an applicant for conscientious objector status developed his beliefs." BIO 12. All the cases cited in the petition, however, state -- in the context of the holding in each case that "rigor" is not a factor in judging whether a belief qualifies as "religious" in the pertinent sense. And petitioner's alleged lack of "religious foundation," after all, is the DACORB "reason" for which the court below claimed to find a "factual basis."

Thus, for example, in United States v. Stetter, 445 F.2d 472, 479 (5th Cir. 1971), the court ruled, "It is not the form or amount of training that is crucial. Sincerity of belief is the touchstone. The extent of training may, and often does, have no correlation with sincerity." The court below used the "rigor and dedication" issue not to dispute petitioner's sincerity but to support an indefensible DACORB conclusion that his beliefs lacked a "religious foundation." DACORB in this case never made a finding of insincerity. All the cases cited in the petition involved traditionally religious COs who developed their beliefs without rigorous training. The courts in those cases held that the extent of religious training is not important, and thus cannot provide a legally sufficient "basis in fact" to support a denial of CO discharge.

The conflict between the court below and the other circuits is thus on the question of whether a

criterion which may not be used for judging traditionally religious COs may nevertheless be invoked as the basis to deny a non-traditional CO. In other words, may the military reject a non-traditional (moral-ethical) CO claim for failure to demonstrate "rigor and dedication" in the faith development process, "comparable" in seriousness (in the judgment of a panel of military officers and then a court) to traditional religious faith-development, when traditionally religious COs do not, under the cases, have to meet that amorphous and undefined standard?

For these reasons certiorari should be granted.

3. The petition contends that the interpretation of the Defense Department directive and Army regulation by the court below is also impermissible because it violates the Establishment Clause and conflicts with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. Respondent contends that petitioner waived the RFRA argument by not "press[ing]" it below. BIO 10. That position misses the point. Properly construed and applied so as to ensure religious neutrality, the military's regulations do not raise these issues. Thus, petitioner's claim below was presented on narrow and uncontroversial grounds that would be sufficient to decide the case. The First Amendment and RFRA issues only arose in this case because of the erroneous application of the regulation by the court of appeals. Accordingly, they were articulated first, other than in passing, in the D.C. Circuit petition for rehearing and then in this Court.

The general rule under the Religious Freedom Restoration Act ("RFRA") is a total prohibition on governmental action which "burdens" an individual's

"exercise of religion." 42 U.S.C. § 2000bb-1(a). Compelling a person's continued membership in the military after that person has developed a religious objection to participating in "war in any form" surely burdens that person's religious exercise. The Act then provides an "exception" to that rule where the government can "demonstrate" that the objectionable requirement is nevertheless the "least restrictive means" of accomplishing a "compelling governmental interest." Id. § 2000bb-1(b). The term "demonstrates" is defined to mean "meets the burden of going forward with the evidence and of persuasion." Id. § 2000bb-2(3) (emphasis added). See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). The military service branches are not exempt from this federal law. Id. §§ 2000bb-2(1), 2000bb-3(a).

Not only does RFRA place the burden on the government rather than on the applicant for exemption, but RFRA also utilizes a definition of the scope of "religious exercise" that is broader than that protected by the Defense Department's existing conscientious objector provisions. See id. § 2000bb-2(4), adopting id. § 2000cc-5(7)(A) (exercise at issue need not be "central" to individual's "system of religious belief"). Any unduly restrictive application of DoD Instruction 1300.06 (2007) (formerly 32 C.F.R. part 75), or a service branch regulation implementing that Instruction, such as AR 600-43 (2006), thus raises the serious question whether the Defense Department is honoring this Congressional mandate.

Similarly, and at least equally disturbing, the interpretation and application of the military's CO rule by the court below, as endorsed by the respondent,

would raise serious questions under the Establishment Clause. No First Amendment constitutional principle is more fundamental than that which holds the government to a standard of strict neutrality as between one form or religion and another. See, e.g., McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 875-76 (2005). It was the avoidance of such problems that led to this Court's broad construction of the statutory definition of religious objection under the Selective Service Act in Seeger and Welsh.[3] Petitioner need not have argued those points affirmatively in his appellate brief to protest now that the rationale of the court of appeals decision is inconsistent with the core principles protected by those precedents.

In the posture of this case, then, the Establishment Clause and RFRA issues not only could not have been raised earlier, but also have now achieved greater importance.

4. Respondent denies any inconsistency between the opinion of the court below and this Court's decision in Witmer v. United States, 348 U.S. 375, 381 (1955). BIO 13-14. The inconsistency, however, is palpable. The court below cited not a single "objective fact[that]

[3] In Gillette v. United States, 401 U.S. 437, 449-60 (1971), this Court rejected an Establishment Clause challenge to the restriction of CO status to those who object to participation in all wars, while excluding selective objectors. The Court identified numerous practical and constitutional problems which it saw arising if the absolute/selective line were breached. No similar problems would be created by requiring the military not to favor traditional religious claims over those founded on equally fundamental moral grounds, in terms of the "rigor" demanded in any explanation of the belief's development.

cast[s] doubt on the sincerity of [petitioner's] claim." Id. 382. But without such facts, the DACORB decision cannot be upheld. Instead, the court below, like DACORB itself, simply ignored the most powerful objective fact in the record that corroborated petitioner's sincerity -- his refusal to load his weapon during an entire combat tour in Iraq. Respondent cites nothing in the record to support a conclusion of insincerity, and indeed it does not appear that DACORB believed petitioner to be insincere. Rather, its decision (like the opinion of the court below) is best read as concluding that petitioner's stated scruples did not qualify because they were not enough like some ideal form of traditional religious belief arrived at through rigorous study, training or contemplation. That conclusion is insupportable either legally or factually.

The decision of the court below places in severe doubt the constitutionality and statutory validity of the military's well-established procedures for recognition and discharge of sincere conscientious objectors, such as petitioner Aguayo. Certiorari should be granted for this final reason as well.

CONCLUSION

For the reasons offered in this Reply and in the original petition, a writ of certiorari should be granted.

Respectfully submitted,

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